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THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, CHAPTER 154: THE KEY TO THE COURTHOUSE DOOR OR SLAUGHTERHOUSE JUSTICE?

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The death penalty is different.[1] A state's authority[2] to extinguish the lives of its citizens is reserved for persons who commit the ultimate crime—murder.[3] Throughout the evolution of American jurisprudence,

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1. *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 357 (1977) (noting that the death penalty "is a different kind of punishment from any other which may be imposed in this country"); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (stating that "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two"); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (commenting that the death penalty is "unique in its severity and irrevocability"); Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (observing that "[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind"). *But see* Richard J. Bonnie, *Preserving Justice in Capital Cases While Streamlining the Process of Collateral Review*, 23 U. TOL. L. REV. 99, 103 (1991) (suggesting that the Supreme Court, in recent years, has abandoned the traditional "death-is-different" rationale).

2. *See* Callins v. Collins, 510 U.S. 1141, 1141 (1994) (Scalia, J., concurring in denial of certiorari) (arguing that the Fifth Amendment clearly permits the imposition of the death penalty).

3. *Compare* Enmund v. Florida, 458 U.S. 782, 797 (1982) (holding that the Constitution prohibits the imposition of the death penalty on a defendant "who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed"), *and* Coker v. Georgia, 433 U.S. 584, 598 (1977) (expressing the Supreme Court's "abiding conviction that the death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life"), *with* Tison v. Arizona, 481 U.S. 137, 158 (1987) (holding "that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement"). As of October 31, 1995, forty jurisdictions had enacted capital punishment statutes. *See* NAACP LEGAL DEFENSE AND EDUC. FUND, INC., DEATH ROW USA 905 (1996). Between January 1, 1973 and January 31, 1996, 318 executions were carried out in the United States. *See id.* The distribution of executions per state between January 1, 1973 and January 31, 1996 is as follows: Alabama (12), Arizona (4), Arkansas (11), California (2), Colorado (0), Connecticut (0), Delaware (7), Florida (36), Georgia (20), Idaho (1), Illinois (7), Indiana (3), Kansas (0), Kentucky (0), Louisiana (22), Maryland (1), Mississippi (4), Missouri (17), Montana (1), Nebraska (1), Nevada (5), New Hampshire (0), New Jersey (0), New Mexico (0), New York (0), North Carolina (8), Ohio (0), Oklahoma (6), Oregon (0), Pennsylvania (2), South Carolina (5), South Dakota (0), Tennessee (0), Texas (104), Utah (5), Virginia (31), Washington (2), Wyoming (1), the United States government (0), and the United States military (0). *See id.* at 914.

enhanced procedural safeguards governing the imposition of capital punishment have remained the administrative centerpieces of a penalty unique in its severity and irrevocability.[4] Appellate proceedings[5] and collateral review[6] are essential to ensuring that capital sentences are not imposed in an arbitrary and capricious manner.[7] Assistance of counsel in capital cases also is critical to meaningful judicial review.[8] The United

4. The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "[n]o State shall . . . deprive any person of *life* . . . without due process of law." U.S. CONST. amend. XIV, § 1 (emphasis added); *see also* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (requiring that a sentencer be permitted to consider a defendant's mitigating character evidence in determining whether to impose the death penalty); *Woodson*, 428 U.S. at 305 (striking down a state statute mandating the imposition of the death penalty on defendants who are convicted of specified crimes); *Furman*, 408 U.S. at 310 (Stewart, J., concurring) (arguing that the "Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed"); Powell v. Alabama, 287 U.S. 45, 72 (1932) (arguing that the conviction and execution of a helpless capital prisoner who was denied appointment of trial counsel would constitute a fundamental violation of due process of law); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 307 (1983) (concluding that *Furman* stands for the proposition that capital punishment violates the Eighth Amendment's proscription against cruel and unusual punishment when it is arbitrarily and capriciously imposed).

5. An "appellate proceeding" refers to the review by a superior court which is granted limited jurisdictional authority to correct errors of law committed by an inferior court in a previous determination of the same case. *See* Waters-Pierce Oil Co. v. State, 106 S.W. 326, 331 (Tex. 1907).

6. Collateral review "is an action that has an independent purpose, and contemplates some relief or result other than the overturning of the judgment, although it may be necessary to its success that the judgment be overthrown." Alford v. Guffy, 115 S.W. 216, 217 (Ky. 1909).

7. *See* Murray v. Giarratano, 492 U.S. 1, 14 (1989) (plurality opinion) (Kennedy, J., concurring in judgment) (noting that collateral review is a critically important aspect of the review process in capital cases); *see also* REPORT OF THE GOVERNOR'S COMM'N ON THE DEATH PENALTY, AN ANALYSIS OF CAPITAL PUNISHMENT IN MARYLAND: 1978-1993, at 187 (1993) (concluding that "[w]ithout [an adequate review process], we cannot be confident that errors . . . will not produce an intolerable mistake: the execution of an innocent person, or of a guilty person not deserving of the ultimate punishment of death"); Nancy Levit, *Expediting Death: Repressive Tolerance and Post-Conviction Due Process Jurisprudence in Capital Cases*, 59 UMKC L. REV. 55, 55 (1990) (noting that collateral hearings and appellate review are central to maintaining the legitimacy of capital punishment); Justice Thurgood Marshall, Address at the Annual Judicial Conference, Second Judicial Circuit of the United States (Sept. 6, 1985), *in* 109 F.R.D. 441, 446 (1985) (arguing that blaming frivolous appeals for the delay in capital cases does not justify the acceptance of an inadequate collateral review process); William H. Brooks, Recent Development, *Meaningful Access for Indigents on Death Row:* Giarratano v. Murray *and the Right to Counsel in Post-Conviction Proceedings*, 43 VAND. L. REV. 569, 571 (1990) (arguing that constitutional defects in trial proceedings which go unnoticed on appeal may be corrected only through habeas corpus proceedings).

8. *See* Bounds v. Smith, 430 U.S. 817, 828 (1977) (holding "that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in

States Supreme Court has recognized an indigent defendant's Sixth Amendment right to appointed counsel at trial[9] and on a first appeal of right.[10] Although Congress furnishes appointed counsel to death-row prisoners in federal habeas corpus proceedings,[11] the Constitution does

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the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law"); *see also* Brooks, *supra* note 7, at 573 (arguing that prisoners' other constitutional rights are meaningless absent the right of access to the courts). A capital petitioner described the inherent problems facing death row prisoners:

> Picture yourself in this situation. You've been convicted of capital murder and sentenced to death. You are indigent, functionally illiterate and mildly retarded. Your court-appointed lawyer tells you that you have the right to appeal your conviction and sentence but that he will no longer represent you . . . . You've been moved into the death house. Your only choice is for you to represent yourself. You must file something with the court or be executed in less than 14 days. You have the right to file a petition for certiorari or a petition for habeas corpus and a motion for a stay of execution. But before you can file you must learn to read, write, overcome your retardation, obtain your trial transcript, understand the science of law, learn how to conduct legal research, analyze vast amounts of case law, formulate your issues, learn all the procedures, learn all the various court rules, understand civil procedure, constitutional law, criminal law and acquire the art of legal writing. You must do all of this and much more in less than 14 days . . . .

Colman McCarthy, *A Defender On Death Row*, WASH. POST, Apr. 15, 1989, at A21 (quoting Joseph Giarratano, Virginia death-row inmate and jailhouse lawyer).

9. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that, absent a knowing and intelligent waiver, the fundamental right to counsel at trial applies in all cases involving possible imprisonment); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (holding that an indigent defendant facing felony prosecution has a right to the appointment of counsel under the Sixth Amendment); Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that indigent defendants have a fundamental right to the appointment of counsel in capital cases); *see also infra* notes 31-45 and accompanying text (discussing the development of the right to the appointment of counsel).

10. *See* Douglas v. California, 372 U.S. 353, 357-58 (1963) (holding that an indigent defendant is entitled to appointment of counsel on a first appeal of right).

11. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(q)(4)(B) & (q)(6), 102 Stat. 4181, 4393-94 (1988) (codified at 21 U.S.C. § 848(q)(4)(B) & (q)(6) (1994)). The relevant language of the Anti-Drug Abuse Act provides that:

> In any post conviction proceeding under Section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys . . . .
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> . . . .
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> If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

Id.

not require states to provide appointed counsel in state post-conviction proceedings.[12]

In response to a hardening public vexation with the seemingly endless postponements in the administration of capital punishment, the forty-second President, William Jefferson Clinton, signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA or Act).[13] Title I creates Chapter 154, containing a host of new procedures governing federal habeas review of state-imposed capital sentences.[14] Chapter 154 encourages states to "fill the gap" between the constitutional right to counsel at trial and on direct appeal and the statutory right to counsel in federal habeas corpus proceedings.[15] States voluntarily may "opt-in" to Chapter 154 and benefit from accelerated federal habeas corpus procedures by establishing a mechanism for the appointment and

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12. *See Murray*, 492 U.S. at 12 (plurality opinion) (determining that states are not required to furnish indigent prisoners with post-conviction counsel in capital cases).

13. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended at 28 U.S.C.A. §§ 2261-66 (West Supp. 1997)) [hereinafter AEDPA or Act].

14. *See* 28 U.S.C.A. §§ 2261-66.

15. *See id.* § 2261. Chapter 154, section 2261 provides, in part:

> (a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.
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> (b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.
>
> (c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—
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> (1) appointing one or more counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;
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> (2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or
>
> (3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

Id. § 2261(a)-(c); *see also* H.R. REP. NO. 104-23, at 10 (1995) [hereinafter *House Report*] (stating that Chapter 154 seeks to "fill the gap in representation for indigent capital defendants in state [post-conviction] proceedings"); *Report on Habeas Corpus in Capital Cases*, 45 CRIM. L. REP. (BNA) 3239, 3239 (Sept. 27, 1989) [hereinafter *Powell Committee Report*] (citing the lack of coordination within the dual state-federal system of appellate review as a source of delay and repetition in capital cases).

compensation of counsel, payment of reasonable litigation expenses, and promulgation of standards for appointing competent counsel to represent indigent capital prisoners in state post-conviction proceedings.[16]

Although Chapter 154 expressly enumerates the available procedural benefits, it furnishes little guidance in defining acceptable standards for competent counsel, compensation, and reasonable litigation expenses.[17] Several states have enacted legislation hoping to opt-in.[18] Other states have tested the sufficiency of their current post-conviction systems under Chapter 154.[19] To date, no state has opted-in.[20] The few judicial opinions

16. *See* 28 U.S.C.A. § 2261(b); *see also* Hill v. Butterworth, 941 F. Supp. 1129, 1134-35 (N.D. Fla. 1996) (explaining that Congress intended that Chapter 154's accelerated habeas corpus procedures apply only to "those states that 'opt-in' to the Act by meeting certain preconditions"). One of the many procedural benefits available to states opting-in to Chapter 154 is a six-month statute of limitations for the filing of federal habeas petitions. *See* 28 U.S.C.A. § 2263(a). Another benefit is the imposition of time restrictions on federal district and appellate courts to complete review of habeas petitions. *See id.* § 2266. The elimination of claims of ineffective assistance of counsel in state or federal post-conviction proceedings also benefits opt-in states. *See id.* § 2261(e). Another important procedural benefit is a diminished ambit of claims that federal courts may consider in habeas review. *See id.* § 2264(a).

17. *Cf. Powell Committee Report, supra* note 15, at 3242 (arguing that the state-federal balance is best preserved by according states broad discretion in devising appointment systems).

18. *See* 1996 Ariz. Legis. Serv. 7th Spec. Sess. S-148 (West); 1996 Ohio Legis. Ser. L-1906 to L-1907 (Banks-Baldwin); 1996 Okla. Sess. Law Serv. 1318-19 (West); S.C. CODE ANN. § 17-27-160 (Law Co-op. 1996).

19. *See* Satcher v. Netherland, 944 F. Supp. 1222, 1245 (E.D. Va. 1996) (Virginia is opt-out as of October 3, 1994), *aff'd in part, rev'd in part*, Satcher v. Pruett, 126 F.3d 561 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 595 (1997); Wright v. Angelone, 944 F. Supp. 460, 464 (E.D. Va. 1996) (Virginia is opt-out as of June 8, 1995); Williams v. Cain, 942 F. Supp. 1088, 1092 (W.D. La. 1996) (Louisiana is opt-out), *aff'd in part, rev'd in part*, 125 F.3d 269 (5th Cir. 1997); *Hill*, 941 F. Supp. at 1147 (Florida is opt-out); Booth v. Maryland, 940 F. Supp. 849, 855 (D. Md. 1996) (Maryland is opt-out), *vacated on other grounds*, 112 F.3d 139 (4th Cir. 1997), *petition for cert. filed*, (U.S. Aug. 14, 1997) (No. 97-5623); Zuern v. Tate, 938 F. Supp. 468, 472 (S.D. Ohio 1996) (Ohio is opt-out); Ryan v. Hopkins, No. 4: CV95-3391, 1996 WL 539220, at *4 (D. Neb. July 31, 1996) (Nebraska is opt-out); Ashmus v. Calderon, 935 F. Supp. 1048, 1074-75 (N.D. Cal. 1996) (California is opt-out), *aff'd* 123 F.3d 1199 (9th Cir. 1997), *cert. granted in part*, 118 S. Ct. 596 (1997); Cockrum v. Johnson, 934 F. Supp. 1417, 1423 (E.D. Tex. 1996) (Texas is opt-out), *rev'd on other grounds*, 119 F.3d 297 (5th Cir. 1997); Hill v. Turpin, No. 1:96-CV-988-GET, slip op. at 2 (N.D. Ga. July 3, 1996) (implying that Georgia is opt-out); Austin v. Bell, 927 F. Supp. 1058, 1061 (M.D. Tenn. 1996) (Tennessee is opt-out); Leavitt v. Arave, 927 F. Supp. 394, 396 (D. Idaho 1996) (presuming in dicta that Idaho is opt-out); *see also* Marcia Coyle, *Florida Flunks Death Counsel Test*, NAT'L L.J., Sept. 30, 1996, at A16 (reporting that Indiana's attorney general conceded in a brief submitted to the United States Court of Appeals for the Seventh Circuit that the State had not satisfied the opt-in requirements of Chapter 154).

20. *See* cases cited *supra* note 19 (addressing the applicability of Chapter 154); *cf. Booth*, 940 F. Supp. at 851 (confirming that 28 U.S.C. § 1331 and § 1343 confer subject matter jurisdiction upon federal courts to determine whether a state has satisfied the opt-

that have evaluated state appointment systems under Chapter 154 provide some insight into why those systems fall short of compliance, but like Chapter 154 itself, these opinions furnish little guidance for developing standards that comply with the Act.[21]

Parts I and II of this Comment examine the evolution of the Sixth Amendment right to counsel and various procedural rules in federal habeas proceedings. Parts I and II illustrate the significant barriers capital prisoners encounter in pursuing habeas corpus relief. Part III examines critical provisions of Chapter 154 and analyzes their potential impact in capital cases. Part IV proposes a series of general considerations applicable to opt-in states. This Comment then offers a statutory proposal in the Appendix for states seeking to avail themselves of Chapter 154's procedural benefits. Finally, this Comment concludes that absent strict enforcement of significantly elevated standards applicable to the appointment of counsel in state post-conviction proceedings, Chapter 154 threatens to further limit the already constricted writ of habeas corpus.

I. EVOLUTION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

The Sixth Amendment to the United States Constitution provides a defendant with the right to the assistance of counsel in a criminal prose-

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in requirements of Chapter 154); *Ashmus*, 935 F. Supp. at 1059 (same). In *Booth*, the court identified a fundamental defect of Chapter 154, namely its silence "as to the procedural mechanism by which the adequacy of a State's post-conviction processes may be challenged in [federal] court." 940 F. Supp. at 851. The *Booth* court opined that "it seems rather clear that it was contemplated that the question of a State's compliance with Chapter 154's requirements would be decided in a proceeding independent of an individual habeas claim." *Id.* at 851. Furthermore, *Booth* exemplified the procedural consequence stemming from Chapter 154's silence in that a determination of a state's opt-in status rests solely with the federal courts. *See id.*

Similarly, in *Ashmus*, the court addressed the potential consequences of Chapter 154's silence as to the judicial review process in determining state compliance. *See* 935 F. Supp. at 1056. Specifically, the court noted that absent a decisive declaration as to the rights and legal relations of the respective parties, "prisoners under sentence of death by the State of California must necessarily guess as to whether and how Chapter 154 may constrain their ability to seek [habeas corpus] redress in the federal courts." *Id.* (quoting Ashmus v. Calderon, No. C96-1533, at 4-5 (N.D. Cal. May 24, 1996)). By failing to provide a mechanism for the immediate determination of a state's status under Chapter 154, Congress created a window of uncertainty in which the controlling legal rights and restrictions are unknown. *See id.* at 1056-57; *see also Booth*, 940 F. Supp. at 852-53 (commenting that "[i]t is unfortunate that a piece of legislation, particularly one of such widespread importance and legitimate public interest, is so poorly drafted").

21. *See Zuern*, 938 F. Supp. at 471 (delineating only the reasons why the State of Ohio did not satisfy the opt-in preconditions of Chapter 154); *Bell*, 927 F. Supp. at 1062 (articulating reasons why the State of Tennessee did not satisfy Chapter 154, but failing to furnish any guidance on how to comply with the Act's preconditions).

cution.[22] Prior to 1932, the United States Supreme Court narrowly construed this Sixth Amendment protection as guaranteeing a criminal defendant only the right to retain counsel at his own expense.[23] Before 1932, neither the Constitution nor federal law obligated states to provide free representation to indigent defendants.[24] Also absent from pre-1932 jurisprudence was the meaningful recognition of a defendant's right to the effective assistance of counsel.[25] Even the most abhorrent demonstrations of attorney incompetence provided no grounds for relief.[26]

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22. *See* U.S. CONST. amend. VI. The Sixth Amendment provides, in pertinent part: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*

23. *See* Powell v. Alabama, 287 U.S. 45, 68 (1932) (recognizing that defendants historically enjoyed "the right to the aid of counsel when desired and provided by the party asserting the right"); *see also* Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part One)*, 29 U. RICH. L. REV. 1327, 1335-36 (1995) (noting that prior to 1932, indigent capital defendants did not have a constitutional right to appointed counsel at the state's expense).

24. *See* Cutts v. State, 45 So. 491, 491 (Fla. 1907) (emphasizing that trial courts are not required to affirmatively determine whether a defendant charged with a felony has procured counsel for his defense); *see also* Coates v. State, 25 A.2d 676, 679 (Md. 1942) ("Never in the State Courts has it been held that care for the interests of defendants in the appointment of counsel has been required as an essential element to a valid trial, under constitutional or other requirement."); People v. Crandell, 258 N.W. 224, 226 (Mich. 1935) (explaining that the right to counsel provided under the state constitution did not imply that a defendant is entitled to appointed counsel at public expense).

25. *See* Clarke, *supra* note 23, at 1339 (noting that prior to *Powell*, state courts generally denied relief regardless of the egregiousness of counsel's conduct). Courts were reluctant to recognize any grounds for collateral relief based on the misconduct or negligence of a defendant's counsel fearing that such recognition would encourage collusive agreements between defendants and their attorneys seeking to challenge otherwise valid criminal convictions. *See id.* at 1340.

26. *See* O'Brien v. Commonwealth, 74 S.W. 666, 669 (Ky. 1903). In *O'Brien*, a teenage appellant appealed his capital conviction and sentence claiming ineffective assistance of counsel at trial. *See id.* Specifically, the defendant alleged that his attorney was so intoxicated during the course of the trial "as to interfere . . . with the discharge of his duty to his client." *Id.* The appeals court refused to acknowledge the ineffective assistance claim, arguing that because defense counsel had been retained by the defendant's mother and the defendant had not objected to the representation, the trial court was entitled to assume that the defendant was satisfied with the attorney's performance. *See id.* Furthermore, the appeals court presumed that because the trial judge had previously adjourned the proceeding to allow defense counsel to sober up, the trial judge again would have adjourned if the circumstances so required. *See id.* Incredibly, the appeals court noted, "[t]he record manifests the admirable care, ability, and fairness with which the case was conducted by the trial judge." *Id.*; *see also* Fambles v. State, 25 S.E. 365, 366 (Ga. 1896) (affirming the murder conviction of a black petitioner despite an inherent conflict of interest implicated by counsel's simultaneous representation of a white accomplice accused of hiring the petitioner to commit the murder); Sayre v. Commonwealth, 238 S.W. 737, 738 (Ky. 1922) (rejecting a capital petitioner's claim of gross ineffective assistance of counsel at trial even though counsel advised the petitioner to lie under oath and, unbeknownst to

The advent of the modern-day right to counsel began in 1932, in *Powell v. Alabama*,[27] when the Supreme Court held that states must provide free legal counsel to indigent defendants in capital cases.[28] Although the *Powell* Court did not expressly hold that a capital defendant's right to the appointment of counsel at trial included the right to the effective assistance of counsel, the Court implied that such an undefined right did exist.[29] The *Powell* Court's recognition of an indigent's right to the appointment and the effective assistance of counsel provided the foundation for the subsequent evolution of the Sixth Amendment right to counsel.[30]

A. The Right to the Appointment of Counsel

From its modest beginning in *Powell*, later Supreme Court decisions broadened the right to appointed counsel.[31] The Court concluded that appointed counsel is essential to a fair trial and, ultimately, the proper functioning of the entire criminal justice system.[32] For example, the

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the petitioner, attempted to suppress inculpatory evidence by intimidating a state's witness).

27. 287 U.S. 45 (1932).

28. *See id.* at 71 (holding that "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law").

29. *See id.* The Court reasoned that the nature of the fundamental right to counsel in capital cases derived not from any enumeration within the first eight amendments, but rather from the fundamental requirements of due process of law. *See id.* at 67-68; *see also* Clarke, *supra* note 23, at 1338 (noting that the *Powell* Court, in defining "effective assistance of counsel," disapproved of the mere formal appointment of counsel which it characterized as "less than 'zealous and active'"). The *Powell* defendants, seven black youths, were sentenced to death for raping two white women in a rural Alabama community. *See* 287 U.S. at 50-51. The trial judge appointed counsel to represent the defendants at an arraignment hearing under the mistaken presumption that counsel would continue to represent the youths at trial. *See id.* at 53-56. On the morning of trial, however, the defendants appeared in court unrepresented by counsel. *See id.* at 56. The trial judge appointed defense counsel only moments before the trial began. *See id.* at 56-57. Thus, because appointed counsel was not provided an opportunity to prepare a defense or investigate the case, the defendants were denied the effective assistance of counsel. *See id.* at 57. Writing for the majority, Justice Sutherland noted that because the complexity of criminal law surpassed the comprehension of even the intelligent and educated layman, legal assistance was critical if a defendant's right to be heard was to have any significant meaning. *See id.* at 68-69.

30. *See Powell*, 287 U.S. at 71; *see also* Clarke, *supra* note 23, at 1337 (characterizing *Powell* as a modest beginning to the development of the right to counsel).

31. *See infra* notes 32-45 and accompanying text (discussing the evolution of the right to the appointment of counsel).

32. *See* Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (holding that the Sixth Amendment right to the appointment of counsel for indigent defendants applies in state

Court interpreted the Sixth Amendment to require appointed counsel for defendants in both federal and state cases involving possible incarceration.[33]

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felony trials). The *Gideon* Court maintained that fundamental fairness is unattainable in an adversarial judicial system without the appointment of counsel. *See id.* at 344. This rationale later was extended to require the appointment of counsel in misdemeanor prosecutions involving potential imprisonment. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). The *Argersinger* Court concluded that "assistance of counsel is often a requisite to the very existence of a fair trial." *Id.* at 31. The Court maintained that although *Powell* and *Gideon* involved felonies, their rationales applied in any criminal proceeding that implicated a potential deprivation of liberty. *See id.* at 32. The *Argersinger* Court noted that "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation." *Id.* at 37 (quoting Baldwin v. New York, 399 U.S. 66, 73 (1970)).

33. *See* Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (holding that the Sixth Amendment requires the appointment of counsel in federal cases involving possible imprisonment). In *Zerbst*, the Court acknowledged that effective representation is critical to preserving the efficacy of criminal trials, rationalizing that a defendant's "right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel." *Id.* The *Zerbst* Court noted that the average defendant lacks the skill and legal training "to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious." *Id.* at 462-63.

While dicta in later Supreme Court decisions referred to the Sixth Amendment right to counsel as fundamental and applicable to the states in non-capital cases, the Court expressly declined to endorse such a bright-line extension, relying instead on a case-by-case analysis to determine when the Due Process Clause of the Fourteenth Amendment required the appointment of counsel. *See* Betts v. Brady, 316 U.S. 455, 473 (1942) ("[W]e cannot say that the [Fourteenth] Amendment embodies an inexorable command that no trial for any offense . . . can be fairly conducted and justice accorded a defendant who is not represented by counsel."), *overruled by Gideon*, 372 U.S. at 344 ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."). For example, in *Grosjean v. American Press Co.*, nine newspaper publishers brought suit to enjoin the enforcement of a Louisiana advertising tax on publications circulating more than 20,000 copies per week. *See* 297 U.S. 233, 240 (1936). With respect to the allegation that the tax violated the First Amendment, the Court stated that in *Powell* it had concluded that "certain fundamental rights . . . were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, *and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.*" *Id.* at 243-44 (emphasis added). Similarly, in *Smith v. O'Grady*, the petitioner, an uneducated layman, claimed that state officials tricked him into pleading guilty to undisclosed charges, after having been assured that leniency would be forthcoming. *See* 312 U.S. 329, 332-33 (1941). Upon receiving an unexpected twenty-year prison sentence, however, the petitioner unsuccessfully attempted to retract his plea and to obtain court-appointed counsel to contest the charges against him. *See id.* at 333. The petitioner alleged that the State had denied him due process of law by refusing to provide appointed counsel upon request. *See id.* at 334. The Supreme Court held that if the petitioner's allegations were true, he was "imprisoned under a judgment invalid because obtained in violation of procedural guarantees [sic] protected against state invasion through the Fourteenth Amendment." *Id.*

The Equal Protection and Due Process Clauses played critical roles in the development of the right to counsel.[34] The Court held that both clauses mandated that defendants be provided with appointed counsel in first appeals of right.[35] The Court rationalized that when states provide a right of appeal, the Due Process and Equal Protection Clauses demand that indigents not be denied the benefit of counsel[36] simply because they are poor.[37] In contrast, both constitutional provisions also underlie the Court's refusal to extend the right to appointed counsel to discretionary

34. *See infra* notes 35-45 and accompanying text (discussing the roles of the Due Process and Equal Protection Clauses in the context of the evolution of the right to counsel).

35. *See* Douglas v. California, 372 U.S. 353, 355-57 (1963) (holding that the Constitution requires states to provide indigent prisoners with appointed counsel in pursuing a first appeal of right).

36. *See* Anders v. California, 386 U.S. 738, 744 (1967). In *Anders*, the petitioner sought an initial appeal of right in the California District Court of Appeals after he was convicted of a felony. *See id.* at 739. Although the appeals court granted the petitioner's request for appellate counsel, the appointed attorney later opined that the record provided no grounds for an appeal. *See id.* Six years later, the petitioner applied for a writ of habeas corpus in state court claiming that the appeals court had violated his right to counsel. *See id.* at 740. The District Court of Appeals, after again reviewing the record, dismissed the petitioner's habeas application concluding that his claims were meritless. *See id.* The United States Supreme Court reversed. *See id.* at 745. The *Anders* Court noted that neither the court of appeals nor appointed counsel found petitioner's appeal "frivolous," instead, only "without merit." *See id.* at 743. The Court ultimately concluded that "California's procedure did not furnish petitioner with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity." *Id.* Moreover, counsel's role as an active advocate on behalf of his client was critical, the Court explained, to safeguarding "[t]he constitutional requirement of substantial equality and fair process." *Id.* at 744.

The Court promulgated prophylactic guidelines applicable in situations like *Anders*. *See id.* These guidelines mandated that appointed counsel must vigorously pursue an indigent client's right of appeal unless, after a conscientious examination of the record and other relevant evidence, counsel finds the case to be frivolous. *See id.* Only then should counsel so advise the court and seek to withdraw. *See id.* Moreover, the *Anders* Court determined that counsel's request to withdraw must be accompanied by "a brief referring to anything in the record that might arguably support the appeal." *Id.* Next, "the court—not counsel—[must] proceed[], after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* The *Anders* Court held that if the appeals court determines the existence of any legal points arguable on the merits, the court "*must* . . . afford the indigent the assistance of counsel to argue the appeal." *Id.* (emphasis added).

37. *See Douglas*, 372 U.S. at 355-57 (holding that when states provide appellate review as a matter of right, the Fourteenth Amendment requires that indigent petitioners not be denied the benefit of counsel on account of their poverty).

appeals[38] and state post-conviction proceedings.[39] The Court explained that, although states voluntarily may elect to provide discretionary appellate and post-conviction remedies,[40] due process notions of fundamental fairness[41] do not require the appointment of counsel as a collateral en-

38. *See* Ross v. Moffitt, 417 U.S. 600, 608-09 (1974) (holding that the federal Constitution does not require states to provide indigents with appointed counsel in pursuing discretionary appeals). The *Ross* Court noted that although the rationale established in *Douglas* derived from the Equal Protection and Due Process Clauses of the Fourteenth Amendment, "[n]either Clause by itself provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors." *Id.* at 609. Due process, the Court explained, is concerned primarily with "fairness" in interaction between the state and the individual, regardless of the treatment accorded other similarly situated individuals. *See id.* On the other hand, Equal Protection emphasizes state action that accords disparate treatment to persons who are similarly situated. *See id.* The Court explained that on appeal, unlike at trial, the presumption of innocence does not apply. *See id.* at 610-11. Appointment of counsel at the trial stage is necessary to protect a defendant from being "haled into court" and denied a fundamental presumption of innocence. *See id.* In contrast, the aid of counsel on appeal is employed to reverse a conviction. *See id.* The Court also asserted that its analysis was consistent with the established proposition that, although states are obligated to respect a defendant's fundamental right to a fair trial, the Constitution does not require states to provide an appellate process. *See id.* at 611.

39. *See* Pennsylvania v. Finley, 481 U.S. 551, 556-57 (1987) (concluding that denial of counsel to indigents in state post-conviction proceedings does not violate the due process notion of fundamental fairness or the equal protection guarantee of "meaningful access" to the courts).

40. *See* McKane v. Durston, 153 U.S. 684, 687 (1894) (explaining that "[a]n appeal from a judgment of conviction is not a matter of absolute right . . . . It is wholly within the discretion of the State to allow or not to allow such a review"); *see also Ross*, 417 U.S. at 611 (observing that states are not required to provide criminal defendants with appellate review). Writing for the majority in *Ross*, Justice Rehnquist determined that the absence of counsel in discretionary appeals did not undermine the guarantee of meaningful appellate review. *See id.* at 615. The majority concluded that the trial court record, the intermediate appellate court opinion, and any additional materials would adequately apprise the reviewing court of petitioner's claims in determining whether to grant certiorari. *See id.* at 615.

41. *See* Bounds v. Smith, 430 U.S. 817, 828 (1977) (holding that the fundamental right of access to the courts requires prison authorities to assist inmates in preparing meaningful legal papers "by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law"). *Bounds* involved a civil rights action brought by North Carolina inmates who claimed that the State had deprived them of their constitutional right of access to the courts by refusing to furnish adequate legal research facilities. *See id.* at 18. The State, however, maintained that it was not constitutionally required to provide inmates with legal research facilities. *See id.* at 827.

The *Bounds* Court relied, in part, on *Johnson v. Avery*. *See id.* In *Avery*, the Court struck down a regulation that prohibited inmates from assisting one another in preparing habeas corpus petitions and other legal papers. *See* 393 U.S. 483, 490 (1969). In doing so, the *Avery* Court reasoned that absent the provision of alternative sources of legal assistance, inmates had no means by which to prepare adequate petitions to obtain access to the courts. *See id.* at 489. The *Bounds* majority maintained that the *Avery* Court did not attempt to articulate "the full breadth of the right of access." *Bounds*, 430 U.S. at 824.

Specifically, the Court determined that the constitutional right of access to the courts did not merely prohibit state interference, but imposed on states an affirmative duty "to assure all prisoners meaningful access to the courts." *Id.* Thus, the *Bounds* Court concluded that the rationale of *Avery* was not inconsistent with requiring states also to institute additional measures that are designed to secure prisoners' right of meaningful access to the courts. *See id.* at 824-25. Moreover, the *Bounds* Court warned that although economic considerations were relevant, "the cost of protecting a constitutional right cannot justify its total denial." *Id.* at 825. The Court encouraged states to be innovative in fashioning alternative mechanisms to provide inmates with meaningful access, but cautioned that "[a]ny plan . . . must be evaluated as a whole to ascertain its compliance with constitutional standards." *Id.* at 832.

In dissent, then Associate Justice Rehnquist criticized the majority holding which he argued directly conflicted with the Court's prior holding in *Ross v. Moffitt*. *See id.* at 839, 840-41 (Rehnquist, J., dissenting); *see also Ross*, 417 U.S. at 618-19 (holding that the federal Constitution does not require states to provide indigent petitioners with appointed counsel in pursuing discretionary appeals). Justice Rehnquist argued that because *Ross* declined to extend the right to appointed counsel to discretionary appeals, the same result should apply with respect to post-conviction proceedings that are one-step removed from discretionary appeals. *See Bounds*, 430 U.S. at 840-41 (Rehnquist, J., dissenting). By construing the right of access to the courts to require states to provide either adequate law libraries or trained legal assistance, Justice Rehnquist insisted that the majority's rationale was destined to provide through *Bounds* an extension of the right to counsel that did not exist under *Ross*. *See id.* at 841 ("If 'meaningful access' . . . is to include law libraries, there is no convincing reason why it should not also include lawyers appointed at the expense of the State."); *see also* Brooks, *supra* note 7, at 580 (noting that Justice Rehnquist's concerns expressed in *Bounds* resurfaced in *Finley*); *infra* notes 42-43 (discussing the Court's holding in *Finley*).

The Supreme Court repeatedly has invalidated regulations and statutes that prevent inmates from accessing the courts. *See, e.g.*, Mayer v. City of Chicago, 404 U.S. 189, 199 (1971) (holding that, regardless of whether a defendant is convicted of a crime punishable by fine rather than by confinement, the State may not refuse to furnish the defendant with a trial record of sufficient completeness to permit proper consideration of his claims on appeal); Williams v. Oklahoma City, 395 U.S. 458, 460 (1969) (holding that refusing to provide an indigent defendant who was convicted of a petty offense with a free trial transcript that he needed to pursue an appeal of right constituted a Fourteenth Amendment violation); *Avery*, 393 U.S. at 490 (striking down a regulation that prohibited inmates from assisting one another in preparing habeas corpus petitions and other legal papers); Gardner v. California, 393 U.S. 367, 370-71 (1969) (holding that states must provide habeas corpus transcripts to indigent prisoners); Roberts v. LaVallee, 389 U.S. 40, 42 (1967) (requiring states to provide free preliminary hearing transcripts to indigents); Long v. District Ct. of Iowa, 385 U.S. 192, 194 (1966) (holding that the State must furnish an indigent petitioner with a transcript of a habeas corpus proceeding for the purpose of appeal); Rinaldi v. Yeager, 384 U.S. 305, 310-11 (1966) (holding that a statute requiring that only prisoners who are denied relief on appeal must repay the cost of a trial transcript used in preparing the appeal violates the Equal Protection Clause of the Fourteenth Amendment); Draper v. Washington, 372 U.S. 487, 499-500 (1963) (striking down a state statute authorizing a trial judge to deny an indigent defendant's request for a trial transcript which he needed to prepare an appeal); Lane v. Brown, 372 U.S. 477, 485 (1963) (holding that an indigent defendant's receipt of a *coram nobis* transcript may not be conditioned upon the approval of the public defender); Burns v. Ohio, 360 U.S. 252, 258 (1959) (excepting indigent prisoners from the required payment of docket fees in filing appeals and habeas corpus petitions because to hold otherwise would completely bar an indigent petitioner from obtaining appellate review); Eskridge v. Washington Bd. of Prison Terms & Paroles, 357

titlement.[42] Moreover, because discretionary appeals and post-conviction review are not afforded as a matter of right,[43] an indigent petitioner de-

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U.S. 214, 216 (1958) (holding that indigent petitioners cannot be denied appellate review because of their inability to purchase trial transcripts); Griffin v. Illinois, 351 U.S. 12, 19-20 (1956) (requiring states to furnish trial transcripts to indigent petitioners in the absence of alternatives which guarantee access to the courts); *Ex parte* Hull, 312 U.S. 546, 549 (1941) (holding that states may not abridge or impair a prisoner's right to petition a federal court for a writ of habeas corpus).

42. *See Finley*, 481 U.S. at 557 (explaining that states are not required to provide post-conviction review, but "when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well"); *Ross*, 417 U.S. at 615 (concluding that the State of North Carolina's refusal to appoint counsel to assist in pursuing a discretionary appeal did not deprive an indigent petitioner of the right of meaningful access to the courts). The Court's holdings in *Ross* and *Finley* significantly contributed to defining the constitutional boundaries of the right to counsel. *See* Murray v. Giarratano, 492 U.S. 1, 7 (1989) (plurality opinion). In *Ross*, the Court stated that prisoners' access to the trial record and appellate briefs and opinions would provide them with the necessary tools to obtain meaningful access to the courts. *See* 417 U.S. at 614-15. Writing for the majority in *Finley*, Chief Justice Rehnquist found the rationale articulated in *Ross* equally applicable in the context of state post-conviction proceedings. *See* 481 U.S. at 557. The *Finley* Court concluded that in discretionary appeals and state habeas corpus proceedings, the Constitution requires only that indigents be provided with sufficient opportunity to fairly present their claims, but this opportunity does not trigger the right to appointed counsel in fulfilling this mandate. *See id.* at 558-59.

43. *See Finley*, 481 U.S. at 557 (noting that states are not required to provide criminal defendants with post-conviction review). The *Finley* Court also considered whether the prophylactic procedures established in *Anders v. California* would apply to appointed representation in collateral proceedings where counsel determined that there were no grounds for pursuing further relief. *See id.* at 554. In *Anders*, the Court adopted mandatory prophylactic procedures applicable where appointed counsel, who is assigned to represent an indigent defendant on an appeal of right, determines that a case is frivolous. *See* 386 U.S. 738, 744 (1967). In doing so, the *Anders* Court sought to protect indigent defendants' fundamental right to appointed counsel by requiring the attorney to "support his client's appeal to the best of his ability." *Id.*

In *Finley*, the petitioner was provided with appointed counsel in pursuing state post-conviction relief, pursuant to Pennsylvania law, after having been sentenced to life imprisonment. *See* 481 U.S. at 553. Appointed counsel requested permission to withdraw from the case after concluding that the petitioner had no available claims on collateral review. *See id.* After conducting an independent review of the record, the trial court agreed with counsel's assessment and dismissed the petitioner's application for state post-conviction relief. *See id.* A state appeals court later held that counsel's conduct violated state law prescribing mandatory procedures applicable where appointed counsel finds no basis for appeal. *See id.* at 554. Furthermore, the appeals court reasoned that because the state procedural requirements derived from the Supreme Court's holding in *Anders*, appointed counsel's inadequate performance in the state post-conviction proceeding also violated the petitioner's federal constitutional rights. *See id.* at 553-54.

The United States Supreme Court held that the Pennsylvania appeals court had "improperly relied on the United States Constitution to extend the *Anders* procedures to post-conviction proceedings." *Id.* at 554. In *Finley*, the Court relied on *Ross v. Moffitt*, reasoning that the lack of a presumption of innocence that foreclosed the right to appointed counsel in discretionary appeals also was inapplicable in post-conviction proceedings that generally are available only after appellate review is exhausted. *See id.* at

nied the assistance of appointed counsel[44] may not legitimately claim that

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556-57 (citing *Ross*, 417 U.S. at 614-15). Moreover, the *Finley* Court maintained that "*Anders* established a prophylactic framework that is relevant when, and only when, a litigant has a previously established constitutional right to counsel." *Id.* at 555. Therefore, because the petitioner did not have a constitutional right to appointed counsel in state post-conviction proceedings, the *Anders* guidelines were inapplicable. *See id.* at 556-57.

44. *See Giarratano*, 492 U.S. at 12 (plurality opinion) (providing three justifications supporting the conclusion that the Constitution does not require states to provide appointed counsel to death-row inmates in state post-conviction proceedings). Writing for the plurality in *Giarratano*, Chief Justice Rehnquist first explained that state habeas corpus proceedings, unlike criminal trials, "are not constitutionally required . . . and serve a different and more limited purpose than either the trial or appeal." *Id.* Therefore, he reasoned that the rule announced in *Finley*, that states are not constitutionally required to provide appointed counsel in state post-conviction proceedings, "should apply no differently in capital cases than in noncapital cases." *Id.*; *see also Finley*, 481 U.S. at 556-57.

Second, Chief Justice Rehnquist addressed the apparent conflict between the rule in *Finley* and the Court's holding in *Bounds v. Smith*, that the fundamental right of meaningful access to the courts requires states to provide inmates either with access to adequate law libraries or alternative sources of legal assistance. *See Giarratano*, 492 U.S. at 11 (plurality opinion); *see also Bounds*, 430 U.S. at 828. Specifically, Chief Justice Rehnquist remarked that "[t]he Court of Appeals . . . relied on what it perceived as a tension between the rule in *Finley* and the implication of our decision in *Bounds v. Smith*; we find no such tension." *Giarratano*, 492 U.S. at 12 (plurality opinion) (internal citation omitted). The *Giarratano* plurality reconciled this perceived inconsistency by holding that the rule of *Finley*, which applies to both capital and noncapital cases, imposes limits on the right of meaningful access required by *Bounds*. *See id.* at 11, 12.

The third justification was that permitting the right of meaningful access involved in *Bounds* to displace the rule of *Finley* would result in the disparate application of constitutional rules. *See id.* at 11-12. The *Giarratano* plurality noted that because a determination of whether a state must fulfill its duty under *Bounds* by providing capital inmates with appointed counsel typically turns on the factual findings of the district court, the highly deferential "clearly erroneous" standard presumably would apply to subsequent appellate review. *See id.* at 12; *see also* Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (explaining that an appellate court may not set aside a district court's findings of fact unless they are clearly erroneous, that is, "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). Therefore, Chief Justice Rehnquist asserted that implementing this standard would produce anomalous results because it "would permit a different constitutional rule to apply in a different State if the district judge hearing that claim reached different conclusions." *Giarratano*, 492 U.S. at 11-12 (plurality opinion). Such a result, the *Giarratano* plurality explained, would be inconsistent with traditional Supreme Court jurisprudence that emphasized the importance of "categorical holdings as to what the Constitution requires with respect to a particular stage of a criminal proceeding in general." *Id.*

Although Chief Justice Rehnquist concluded that the right to appointed counsel does not apply in post-conviction proceedings in capital cases, his position is not a holding of the Supreme Court. *See* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases: Report Containing the American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus and Related Materials from the American Bar Association Criminal Justice Section's Project on Death Penalty Habeas Corpus*, 40 AM. U. L. REV. 1, 90 (1990) [hereinafter *ABA Report*].

the government accorded different treatment to similarly situated persons.[45]

B. The Right to the Effective Assistance of Counsel

Unlike the right to the appointment of counsel, the right to the effective assistance of counsel remains a relatively undeveloped area of Su-

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Justice Kennedy, who cast the deciding fifth vote, applied an entirely different rationale. *See Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in judgment). Unlike the plurality, Justice Kennedy implied that the right of meaningful access involved in *Bounds* may, in certain circumstances, require states to provide counsel for death-row inmates in state post-conviction proceedings, acknowledging "that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." *Id.* Additionally, Justice Kennedy concluded that the complexity of habeas corpus proceedings "makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Id.* Justice Kennedy, however, declined to support the adoption of a "categorical remedy" that would require states to furnish post-conviction counsel in capital cases, reasoning that Congress, rather than the Supreme Court, was better equipped to implement appropriate measures to safeguard the right of meaningful access to the courts. *See id.* Moreover, because "no prisoner on death row in Virginia ha[d] been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for post-conviction relief," Justice Kennedy was unwilling to hold that Virginia had violated the capital prisoners' constitutional rights. *Id.* at 14-15. Nonetheless, Justice Kennedy's concurrence suggests that a majority of the Court would reject the *Giarratano* plurality's rationale in a future capital case involving more egregious deprivations of the right of meaningful access. *See id.* at 15 ("On the facts and record of *this case*, I concur in the judgment of the Court." (emphasis added)).

45. *See Finley*, 481 U.S. at 557 (maintaining that the Equal Protection Clause's guarantee of "meaningful access" does not compel states to provide appointed counsel in state post-conviction proceedings). In *Finley*, the respondent relied, in part, on *Evitts v. Lucey* in asserting that a state's election to furnish inmates with appointed counsel in post-conviction proceedings triggers the due process protections adopted in *Anders v. California*. *See id.*; *see also* Evitts v. Lucey, 469 U.S. 387, 401 (1985) ("[W]hen a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act . . . in accord with the Due Process Clause."). In *Evitts*, a state prisoner brought an appeal of right in the Kentucky Court of Appeals. *See* 469 U.S. at 389. The appeals court dismissed the case because the defendant's appointed lawyer failed to file a statement of appeal, as required by state law. *See id.* at 389-90. The United States Supreme Court held that when a state provides a criminal defendant with appointed counsel to pursue an appeal of right, the Due Process Clause requires that counsel comply with the prophylactic procedures adopted in *Anders*. *See id.* at 396-97.

The *Finley* Court, however, declined to extend *Evitts* to post-conviction proceedings. *See* 481 U.S. at 559. The Court reasoned that the rule of *Evitts* presupposes that a prisoner has a constitutional right to the appointment of counsel on an appeal of right. *See id.* at 558. By contrast, the constitutional right to appointed counsel did not apply in the state post-conviction proceeding at issue in *Finley*. *See id.* Moreover, unlike the prisoner in *Evitts* who was completely barred from pursuing an appeal of right by virtue of his lawyer's improvidence, the petitioner in *Finley* faced no impediment to pursuing collateral review. *See id.* Ultimately, the *Finley* Court concluded that "the Constitution does not put the State to the difficult choice between affording no counsel whatsoever or following the strict procedural guidelines enunciated in *Anders*." *Id.* at 559.

preme Court jurisprudence.[46] In *Strickland v. Washington*,[47] the Supreme Court, for the first time, articulated constitutional standards governing the right to the effective assistance of counsel.[48] Under the *Strickland* test, to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's representation was so deficient that counsel was not acting as "counsel" guaranteed under the Sixth Amendment;[49] and (2) counsel prejudiced the defendant's case to such a degree that, but for counsel's delinquent representation, a reasonable probability exists that the outcome of the trial would have been different.[50]

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46. *See* Avery v. Alabama, 308 U.S. 444, 446 (1940). In *Avery*, the Court avoided articulating a precise definition of the effective assistance of counsel. *See id.* Rather, the Court warned only that the rule of *Powell*, that states must provide indigents with appointed trial counsel in capital cases, is not satisfied when counsel is precluded from conferring with his client in preparing a defense. *See id.*; *see also* Powell v. Alabama, 287 U.S. 45, 71 (1932). The Court further developed the concept of the effective assistance of counsel in *Glasser v. United States*. *See* 315 U.S. 60, 70 (1942). In *Glasser*, the Court held that the Sixth Amendment requires that a criminal defendant be afforded the assistance of counsel who is not impaired by a conflict of interest. *See id.* Later, in *McMann v. Richardson*, the Court formally recognized "that the right to counsel is the right to the effective assistance of counsel." 397 U.S. 759, 771 n.14 (1970). However, the *McMann* Court expressly declined to formulate constitutionally-based standards governing the effective assistance of counsel. *See id.* at 771. Instead, the Court decided that a determination of whether counsel has provided effective assistance "should be left to the . . . discretion of the trial courts with the admonition that . . . the right to counsel . . . cannot be left to the mercies of incompetent counsel." *Id.*

47. 466 U.S. 668 (1984).

48. *See id.* at 688 (declaring that "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms"). The *Strickland* Court explained that a defendant may be deprived of his constitutional right to the effective assistance of counsel in two ways. *See id.* at 686. First, a defendant is deprived of the right to the effective assistance of counsel when the government "interferes . . . with the ability of counsel to make independent decisions about how to conduct the defense." *Id.* Additionally, counsel can deny an accused the effective assistance of counsel "simply by failing to render 'adequate legal assistance.'" *Id.* (quoting Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)). The constitutional standards promulgated in *Strickland* were intended to clarify the meaning of the right to the effective assistance of counsel only with respect to the latter category. *See id.*

The *Strickland* Court opined that it was inappropriate to adopt specific constitutional requirements governing the effective assistance of counsel. *See id.* at 688. The Court explained that the prevailing standard of "objective reasonableness under the circumstances" was more consistent with the Sixth Amendment "that refers simply to 'counsel,' not specifying particular requirements of effective assistance." *Id.* Moreover, the Court opined that the purpose of the Sixth Amendment was "to ensure a fair trial." *Id.* at 686. Thus, standards for judging ineffective assistance must focus on whether counsel's performance was sufficient to ensure the integrity of the adversarial process. *See id.*

49. *See id.* at 687.

50. *See id.* at 687, 694. The *Strickland* Court emphasized that a defendant cannot prevail on a claim of ineffective assistance of counsel by demonstrating that counsel's blunders merely "had some conceivable effect on the outcome of the proceeding." *Id.* at

The Court stressed that reviewing courts should preserve the strong presumption of effectiveness[51] and refused to differentiate between criminal trials and capital sentencing proceedings in applying the *Strickland* test.[52] The Court maintained that these proceedings are indistinguishable for purposes of evaluating effective assistance because both involve an adversarial format.[53] Undoubtedly, this rationale emphasizes that the *Strickland* test focuses not on the nature of the crime or the punishment imposed, but on ensuring the reliability of the adversarial process.[54]

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693. Rather, *Strickland* requires that a defendant claiming ineffective assistance must "affirmatively prove prejudice." *Id.* The Court advanced three justifications for requiring a defendant to shoulder this burden. *See id.* First, the Court reasoned that if a defendant was required to demonstrate only that counsel erred during the trial proceeding, "[v]irtually every act or omission of counsel would meet that test." *Id.* The Court explained that a standard not requiring proof of actual prejudice is wholly deficient "because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding." *Id.* On the other hand, a showing of actual prejudice differentiates serious attorney errors that impair the proper functioning of the adversarial process, thus warranting relief, from errors that do not. *See id.* Second, the Court reasoned that because the prosecution is not responsible for the conduct of defense counsel, it is powerless to prevent errors in the defense that are sufficiently serious to warrant setting aside a conviction or sentence. *See id.* Thus, the Court concluded that a defendant rightfully should bear the burden of proving that the conduct of counsel acting on his behalf actually prejudiced the defense. *See id.* Finally, the Court rationalized that the actual prejudice requirement "also reflects the profound importance of finality in criminal proceedings." *Id.* at 693-94.

51. *See id.* at 689. The *Strickland* Court instructed lower courts to evaluate counsel's conduct in light of the circumstances that existed at the time of the alleged error. *See id.* The Court cautioned lower courts not to rely on the benefit of hindsight in assessing attorney performance because "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.*

52. *See id.* at 686-87.

53. *See id.*

54. *See id.* at 686; *see also* United States v. Cronic, 466 U.S. 648, 666 (1984) (requiring a defendant to show "that counsel failed to function in any meaningful sense as the Government's adversary"). In *Cronic*, the respondent's court-appointed trial lawyer, a young real estate attorney with no trial experience, was permitted only twenty-five days to review and investigate a case that had taken the government over four years to prepare. *See id.* at 649, 665. Although counsel did establish certain facts through the cross-examination of government witnesses that were consistent with his client's claim of innocence, counsel presented no defense. *See id.* at 651. The United States Court of Appeals for the Tenth Circuit granted the defendant's claim of ineffective assistance of counsel, inferring inadequate representation from the circumstances of the case. *See id.* at 652-53. The Supreme Court reversed because the Sixth Circuit failed to determine whether the appointed lawyer sufficiently challenged the Government's case. *See id.* at 666. When read together, *Strickland* and *Cronic* support the general proposition that the standard for determining the effective assistance of counsel requires only that the government's case be subjected to a minimal degree of adversarial challenge irrespective of counsel's experience or knowledge, or the complexity of the issues involved. *See* Clarke, *supra* note 23, at 1347-48 (not-

II. THE HISTORY OF HABEAS CORPUS AND THE DEVELOPMENT OF PROCEDURAL DEFAULT, THE EXHAUSTION DOCTRINE AND NONRETROACTIVITY

The great writ of habeas corpus is the sentinel of democratic liberty vis-à-vis the power of the state.[55] The writ confers upon a prisoner the right to request that the judiciary consider the constitutionality of his detention.[56] By granting the writ of habeas corpus, a court may compel the government to explain the reasons for a prisoner's incarceration.[57] If the government provides insufficient justification or fails to show that it complied with the "fundamental requirements of law," a court may order a prisoner's immediate release.[58] Thus, habeas corpus preserves legitimate democracy by empowering the judiciary to hold the executive branch accountable for a person's imprisonment.[59]

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ing that *Cronic*, which was decided on the same day as *Strickland*, shed further light on the evolving standard of effective assistance of counsel).

55. *See* Larry W. Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609, 609 (1983) (commenting that "[t]he Great Writ has no substantive content of its own but provides the machinery for putting claims before state and federal courts—for translating substantive principles of liberty into effective law"). In American jurisprudence, the writ of habeas corpus is anchored in the Suspension Clause. *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); *see also* Eisentrager v. Forrestal, 174 F.2d 961, 966 (D.C. Cir. 1949) (maintaining that by including the Suspension Clause in the Constitution, the framers viewed the preservation of habeas corpus as so important that they chose not to "leave the possibility of misunderstanding upon the topic to later determination, as they did the several prohibitions later incorporated in the first Ten Amendments"), *rev'd on other grounds*, 339 U.S. 763 (1950).

56. *See* Fay v. Noia, 372 U.S. 391, 402 (1963) (explaining that habeas corpus is grounded in the belief that society requires that the government be held accountable to the judiciary for a man's confinement), *overruled by* Coleman v. Thompson, 501 U.S. 722 (1991).

57. *See id.*

58. *See id.*

59. *See id.*; *see also* Frank v. Mangum, 237 U.S. 309, 346-47 (1915) (Holmes, J., dissenting). Justice Holmes eloquently summarized the posture of habeas corpus in Anglo-American jurisprudence:

> *[H]abeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell . . . .Whatever disagreement there may be as to the scope of the phrase "due process of law," there can be no doubt that it embraces the fundamental conception of a fair trial . . . .We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted. In such a case, the Federal court has jurisdiction to issue the writ. The fact that the state court still has its general jurisdiction and is otherwise a competent court does not make it impossible to find that a jury has been subjected to intimidation in a particular case.

Id. at 346-47.

Historically, federal habeas corpus review played a limited judicial role, functioning only as a means of testing a court's jurisdictional validity or the legality of executive incarceration.[60] The federal courts' power to grant habeas corpus petitions initially was confined to prisoners detained under federal authority.[61] In other words, federal courts were not authorized to review state convictions or sentences in habeas corpus proceedings.[62] Congress later broadened federal habeas corpus jurisdiction[63]

60. *See* Schlup v. Delo, 513 U.S. 298, 317 (1995) (explaining that the Court's traditional tolerance of successive habeas corpus petitions was attributed to "the fact that the writ originally performed only the narrow function of testing either the jurisdiction of the sentencing court or the legality of Executive detention"). The great writ of habeas corpus has been haled as "the most celebrated writ in the English law." *Fay*, 372 U.S. at 400 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *129). The writ's evolution spanned three centuries culminating in a "Great Writ of Liberty" which served to cure unlawful detention. *See* Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 462 (1990-1991). The writ derived from two distinct procedural mechanisms employed by early English courts. *See id.* The first mechanism, a summonsing process, compelled unwilling prisoners to appear before the court to answer charges levied against them. *See id.* The second mechanism facilitated judicial inquiry into the cause of an inmate's confinement and to remedy judicial error. *See id.* The merger of these two devices formed a writ known as habeas corpus cum causa. *See id.* Early English common law courts employed habeas corpus cum causa to defend their jurisdiction against encroachment by burgeoning ecclesiastic and equity courts. *See id.* A writ issued by the common law court could effectuate the release of a prisoner confined by the authority of a rival court on the ground of improper jurisdiction. *See id.* The English codified the writ in the Habeas Corpus Act of 1679. *See id.* at 463. This Act, however, only supplemented pre-existing common law provisions and cured judicial abuses with respect to prosecution of minor offenses. *See id.* At the time of the Constitutional Convention in 1787, the English writ of habeas corpus had evolved into both a common law and statutory forms in all of the American colonies. *See id.* Courts could issue the writ to persons convicted in criminal courts and those detained for minor offenses to cure "any kind of governmental restraint contrary to fundamental law." *Fay*, 372 U.S. at 405.

61. *See Fay*, 372 U.S. at 409 (explaining that federal habeas corpus review did not extend to inmates in state custody).

62. *See id.* at 409-10.

63. *See id.* (discussing the expansion of federal habeas corpus review to include state prisoners' constitutional claims); *see also* Mello & Duffy, *supra* note 60, at 469-70 (discussing the historical development of habeas corpus). The writ expanded in the United States beginning in 1833 when Congress authorized federal courts "to grant writs of habeas corpus in all cases of a prisoner or prisoners, in jail or confinement . . . by any authority or law, for any act done . . . in pursuance of a law of the United States." Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 634. The evolution of habeas corpus jurisdiction in American jurisprudence accelerated considerably in the wake of the Civil War due, in part, to the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments and the passage of the Habeas Corpus Act of 1867. *See* Mello & Duffy, *supra* note 60, at 469; *see also* Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (codified at 28 U.S.C. §§ 2241-55 (1994)). The 1867 Act authorized lower federal courts "to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution." Act of Feb.

to encompass Fourteenth Amendment claims brought by state prisoners as long as the prisoner had exhausted all his state law remedies.[64]

As the expansion of federal habeas jurisdiction encroached on the judicial sovereignty of the states in the administration of criminal law, the Supreme Court had to determine the degree of deference that federal courts would afford state procedural rules in federal habeas corpus proceedings.[65] The expanded scope of federal habeas corpus also threatened the finality[66] of state convictions and the principles of comity[67] and federalism[68] when federal courts reversed state judgments that violated the

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5, 1867, ch. 28, 14 Stat. 385. Despite its broad language, some scholars have argued that the 1867 Act was not intended to make federal habeas review available to state prisoners, but rather, only to secure freedom for emancipated slaves. *See generally* Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 34-39 (1965-1966). The writ, however, extended federal habeas jurisdiction to encompass claims of state prisoners. *See* Mello & Duffy, *supra* note 60, at 469.

Later Supreme Court decisions illustrate the writ's expansion. *See, e.g.*, *Fay*, 372 U.S. at 426-27 (holding that state procedural default rules would not preclude federal habeas review); Townsend v. Sain, 372 U.S. 293, 316 (1963) (requiring an evidentiary hearing in a state prisoner's habeas corpus proceeding); Brown v. Allen, 344 U.S. 443, 477-82 (1953) (permitting the review of alleged juror discrimination in state criminal court); Moore v. Dempsey, 261 U.S. 86, 89, 92 (1923) (remanding an Arkansas capital case to the district court for a hearing surrounding the validity of a trial that lasted only forty-five minutes and in which defense counsel neither called witnesses to testify for the defense nor consulted with defendants).

64. *See Brown*, 344 U.S. at 462 (holding that federal judges presented with habeas petitions first passed over by state courts are "required to . . . dispose of the matter as law and justice require" (citing 28 U.S.C. § 2243 (1952))); *see also* Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part Two)*, 30 U. RICH. L. REV. 303, 329 (1996) (discussing the implications of *Brown* with respect to the expansion of habeas corpus jurisdiction).

65. *See* Clarke, *supra* note 64, at 329 (explaining that the expansion of federal habeas corpus jurisdiction to encompass state prisoners' constitutional claims prompted the question of how much deference federal courts would accord state procedural default rules).

66. "Finality" is the resolution of all disputes of fact and law presented at trial. *See* Edward H. Cooper, *Extraordinary Writ Practice in Criminal Cases: Analogies for the Military Courts*, Address at the Eighth Annual Homer Ferguson Conference of the United States Court of Military Appeals (May 18, 1983), *in* 98 F.R.D. 593, 594 (1983) (explaining that finality intimates the conclusion of trial litigation, leaving only the execution of the judgment to be completed).

67. *See* Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900) (defining "comity" as a rule of practice by which one court defers to the coterminous jurisdiction of another, which in turn fosters uniform decisions and discourages repetitive litigation); *see also* Coleman v. Thompson, 501 U.S. 722, 731 (1991) (explaining that comity intimates that "in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights").

68. *See generally* DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW 773-74 (1993) (explaining that "federalism" is a system of government in which power is divided between at least two levels of sovereignty, a central government and multiple local governments, by a constitution consisting of both exclusive and concurrent powers).

federal Constitution.[69] The Supreme Court established procedural limits on federal habeas corpus review that were designed to eliminate unnecessary delay while preserving the writ's fundamental purpose of curing constitutional error.[70] The Rehnquist Court, however, has extended these procedural barriers constructing an array of obstacles through which capital petitioners must navigate or forfeit otherwise valid claims.[71]

69. *Cf. Coleman*, 501 U.S. at 726 (refusing to excuse a procedurally defaulted claim of a state prisoner whose lawyer failed to file a timely petition and stating "[t]his case is about federalism"); McCleskey v. Zant, 499 U.S. 467, 491 (1991) (arguing that federal authority must not unnecessarily inhibit the states in the enforcement of criminal law); Rose v. Lundy, 455 U.S. 509, 518 (1982) (plurality opinion) (contending that the exhaustion rule is intended to protect the states' authority to first review claims of alleged constitutional error); Francis v. Henderson, 425 U.S. 536, 541 (1976) (arguing that comity and federalism generally prevent federal courts from overturning state criminal convictions); *see also* Rae K. Inafuku, Comment, Coleman v. Thompson—*Sacrificing Fundamental Rights in Deference to the States: The Supreme Court's 1991 Interpretation of the Writ of Habeas Corpus*, 34 SANTA CLARA L. REV. 625, 637 (1994) (noting that the tension between federal and state jurisdiction frustrates state efforts to develop and enforce criminal laws).

70. *See* Fay v. Noia, 372 U.S. 391, 438 (1963) (holding that federal courts are permitted to dismiss a state prisoner's habeas corpus petition when the prisoner has deliberately by-passed state remedial procedures), *overruled by* Coleman v. Thompson, 501 U.S. 722 (1991); *Brown*, 344 U.S. at 447 (holding that compliance with the exhaustion requirement does not demand that a prisoner repeatedly seek state collateral relief asserting the same claims that were decided on direct review).

71. *Cf.* Murray v. Giarratano, 492 U.S. 1, 14 (1989) (plurality opinion) (Kennedy, J., concurring in judgment) (observing that capital petitioners will not be able to draft meaningful petitions without legal assistance due to the complexity of post-conviction litigation); *Coleman*, 501 U.S. at 753-54 (holding that attorney error, ignorance or inadvertence not amounting to ineffective assistance cannot excuse procedural default); *Rose*, 455 U.S. at 522 (plurality opinion) (instructing federal district courts to "dismiss habeas [corpus] petitions containing both unexhausted and exhausted claims"). *See generally* Clarke, *supra* note 23, at 1329 (noting that most habeas corpus petitions will fail due to procedural default).

Among the more severe barriers erected by the Rehnquist Court are the doctrines of procedural default,[72] exhaustion,[73] and nonretroactivity.[74]

A. Procedural Default

Procedural default bars both frivolous and non-frivolous claims that were not raised or preserved properly in prior judicial proceedings, thereby eliminating any prospect of adjudicating the claims on their merits in a subsequent appellate or habeas corpus proceeding.[75] Procedural default rules are incorporated into state and federal judicial systems to promote the efficient and orderly resolution of issues in appellate and habeas corpus proceedings.[76] State prisoners' constitutional claims once were redressible in federal habeas corpus proceedings irrespective of any independent and adequate state law ground that otherwise would prohibit direct Supreme Court review.[77] Although state procedural default rules might have barred a state court from considering the merits of a constitutional claim, the federal courts were not similarly constrained.[78]

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72. "Procedural default" is the forfeiture of an appellate issue that is not timely and properly asserted. *See* Clarke, *supra* note 64, at 328-29. Most states institute procedural default rules to compel the efficient resolution of issues in appellate and post-conviction proceedings. *See id.* at 328; *see also infra* notes 75-113 and accompanying text (discussing procedural default).

73. The "exhaustion doctrine" refers to the federal judiciary's general practice of not intervening in disputes when state remedies are available. *See* United States v. Texas, 430 F. Supp. 920, 930 (S.D. Tex. 1977); *see also infra* notes 114-26 and accompanying text (discussing the exhaustion doctrine).

74. *See* Penry v. Lynaugh, 492 U.S. 302, 313 (1989) (explaining that the nonretroactivity doctrine provides that new constitutional rules may "not be applied or announced in cases on collateral review unless they fall into one of two exceptions" (citing Teague v. Lane, 489 U.S. 288, 311-13 (1989))); *infra* notes 127-51 and accompanying text (discussing the nonretroactivity doctrine).

75. *See* Clarke, *supra* note 64, at 328-29 (explaining that procedural default includes all forfeitures resulting from failure to properly raise claims).

76. *See id.* at 328 (observing that procedural rules facilitate the orderly resolution of disputed issues).

77. *See* Fay v. Noia, 372 U.S. 391, 428-30 (1963), *overruled by* Coleman v. Thompson, 501 U.S. 722 (1991). The *Fay* Court acknowledged the general rule that the Supreme Court will not review a federal claim decided by a state court on direct appeal if the judgment rests on a state-law ground that is independent of the federal issue and adequate to support the judgment. *See id.* at 430. This rule is based on the rationale that, in such instances, "[t]he federal question is moot; nothing turn[s] on its resolution." *Id.* at 429. The *Fay* Court refused to extend the "independent and adequate ground" rule to federal habeas corpus proceedings, concluding that habeas corpus jurisdiction is triggered by unlawful detention rather than the judgment of a state court. *See id.* at 430.

78. *See id.* at 430. Although *Fay* involved a state prisoner sentenced to life imprisonment, its lengthy discourse suggested a uniform applicability to all constitutional claims subject to state procedural default in federal habeas corpus proceedings. *See id.* at 435 ("[O]ur decision today affects *all procedural hurdles* to the achievement of swift and im-

Unless a prisoner deliberately "by-passed" available state remedies, that is, intentionally circumvented the orderly procedure of the state court in pursuing relief, a federal court could consider his constitutional claims.[79]

The Rehnquist Court retreated from this liberal application of the writ.[80] The Court now requires lower federal courts to enforce state procedural rules strictly by refusing to address federal claims previously defaulted in state courts.[81] Furthermore, in a series of decisions, the Court jettisoned the traditional by-pass rule in favor of a more onerous standard.[82]

The initial inroad on the authority of federal courts to review constitutional claims previously defaulted in state courts began with *Francis v. Henderson*.[83] In *Francis*, the Court carved out a narrow exception to the by-pass rule, holding that a state prisoner who failed to object to the composition of a grand jury prior to trial, as required by state law, was not entitled to challenge the state court decision in a subsequent habeas corpus proceeding unless he could show sufficient cause for failure to object and that he suffered actual prejudice as a result.[84]

The Court later broadened this exception in *Wainwright v. Sykes*.[85] In *Sykes*, the Court held that the rule announced in *Francis* also applies to federal claims that are procedurally defaulted in state criminal trials.[86] Specifically, the Court held that a state prisoner's failure to timely chal-

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perative justice on habeas corpus." (emphasis added)).

79. *See id.* at 438. The *Fay* Court concluded that state law could not be allowed to undermine the fundamental purpose of habeas corpus review, that of releasing persons detained in violation of the Constitution. *See id.* at 433-34.

80. *See* Clarke, *supra* note 23, at 1327 (accusing the Rehnquist Court of "virtually obliterating" habeas corpus as a remedy to correct human rights violations); Christopher E. Smith & Avis Alexandria Jones, *The Rehnquist Court's Activism and the Risk of Injustice*, 26 CONN. L. REV. 53, 66 & n.63 (1993) (asserting that the predominant characteristic of the Rehnquist Court's habeas corpus jurisprudence, "[j]udicial activism for the sake of court efficiency," is consistent with Chief Justice Rehnquist's position that the Supreme Court of the United States is a forum for resolving significant issues of law, not for correcting injustice).

81. *See* Clarke, *supra* note 23, at 1328 (noting that the Rehnquist Court strictly enforces state procedural default rules in federal habeas corpus proceedings).

82. *See* Coleman v. Thompson, 501 U.S. 722, 750 (1991) (holding that "[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to . . . [a] state procedural rule, federal habeas review . . . is barred unless the prisoner can demonstrate cause . . . and actual prejudice").

83. 425 U.S. 536 (1976).

84. *See id.* at 542. In dissent, Justice Brennan foresaw the inevitable destiny of the majority's reasoning, warning that "this holding portends one of two inevitable consequences—either the overruling of *Fay* or the denigration of the right to a constitutionally composed grand jury." *Id.* at 546 (Brennan, J., dissenting).

85. 433 U.S. 72 (1977).

86. *See id.* at 87.

lenge the admissibility of his confession at trial, pursuant to the state's contemporaneous objection rule, precluded federal habeas corpus review "absent a showing of 'cause' and 'prejudice.'"[87] The Court, however, did not define "cause and prejudice," noting only that it was narrower than the traditional by-pass rule.[88] Rather, the *Sykes* Court left "open for resolution in future decisions the precise definition of the 'cause' and 'prejudice' standard."[89] In later decisions, the Court effectively abandoned the by-pass rule, expanding the "cause and prejudice" standard to apply in all cases in which a state prisoner forfeited his federal claims in state court pursuant to an independent and adequate state procedural default rule.[90]

In the wake of *Francis* and *Sykes*, the dual prongs of the cause and prejudice standard began to take shape as later holdings continued to define its conceptual boundaries.[91] For example, the Court held that a petitioner's failure to raise a foreseeably valid constitutional claim was not sufficient cause when the "tools" needed to construct and argue the claim were available at the time of default.[92] On a separate occasion, the Court

87. *Id.* In *Sykes*, the respondent challenged his murder conviction on the grounds that his own inculpatory statements made to police were admitted at trial in violation of his *Miranda* rights. *See id.* at 74; *see also* Miranda v. Arizona, 384 U.S. 436, 478 (1966) (holding that confessions obtained in violation of the privilege against self-incrimination are inadmissible in the defendant's criminal trial). Defense counsel neither objected to the introduction of the respondent's statements at trial nor raised the claim on direct appeal. *See Sykes*, 433 U.S. at 75. The respondent raised the *Miranda* claim for the first time in a state habeas petition. *See id.* Florida's contemporaneous objection rule required that objections to the admissibility of confessions be raised at trial. *See id.* at 86. Because counsel failed to object to the admission of the confession at trial, the Court held that the respondent was barred from raising the claim in a federal habeas corpus proceeding absent a showing of cause and prejudice. *See id.* at 87. The Court argued that "[t]o the greatest extent possible all issues . . . [of guilt or innocence] should be determined [at trial]: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses . . . await their turn to testify." *Id.* at 90.

88. *See Sykes*, 433 U.S. at 87.

89. *Id.*

90. *See* Coleman v. Thompson, 501 U.S. 722, 750 (1991) (making explicit that which was only implied in earlier cases, namely, that the by-pass rule has been superseded by the "cause and prejudice" standard); *see also* Murray v. Carrier, 477 U.S. 478, 497 (1986) (applying the "cause and prejudice" standard to the failure to raise a federal claim on direct appeal in state court).

91. *See Carrier*, 477 U.S. at 488 (explaining that to establish "cause" to excuse a procedural default, a state prisoner must demonstrate "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule"); United States v. Frady, 456 U.S. 152, 170 (1982) (explaining that to establish "prejudice" a state prisoner must show that an alleged violation "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions" (emphasis omitted)).

92. *See* Engle v. Isaac, 456 U.S. 107, 134 (1982) (holding that when judicial precedent

held that failure to preserve a claim based on a state law violation that was an element of a subsequently available federal claim was not cause to excuse a petitioner's failure to raise the claim on direct appeal in state court.[93] However, the Court also held that failure to raise a previously unavailable constitutional claim constituted adequate cause due to its novelty and the absence of any reasonably cognizable state grounds upon which the claim could have been founded.[94] Finally, the Court determined that attorney error or inadvertence falling short of ineffective assistance of counsel does not constitute cause to excuse a procedural default.[95] Rather, attorney improvidence constitutes cause only when a

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provides the basis for a constitutional claim that was apparent to other defense counsel who previously litigated the claim, failure to raise the subsequently valid claim does not constitute cause even if the existence of the claim was unknown to counsel at the time of default).

93. *See* Dugger v. Adams, 489 U.S. 401, 410 (1989) (maintaining that defense counsel should have objected on due process grounds to the trial judge's remarks in which he misled prospective jurors to believe that the court, rather than the sentencing jury, must decide whether to impose the death penalty).

94. *See* Reed v. Ross, 468 U.S. 1, 19 (1984) (noting that the legal basis underlying the prisoner's constitutional claim was unavailable until six years after the procedural default in state court).

95. *See Coleman*, 501 U.S. at 757 (holding that the ineffective assistance of counsel on appeal from a state habeas corpus proceeding does not constitute cause to excuse procedural default for purposes of federal habeas corpus review); *Carrier*, 477 U.S. at 488 (reasoning that as long as the defense counsel's performance is not constitutionally ineffective, a defendant bears the risk that mere attorney negligence will produce a procedural default); *see also* Strickland v. Washington, 466 U.S. 668, 688 (1984) (defining the constitutional standard of the effective assistance of counsel as objective reasonableness under the circumstances).

In *Coleman*, the petitioner was convicted of rape and capital murder and sentenced to death in a Virginia state court. *See* 501 U.S. at 726-27. After he was denied relief in his initial state habeas corpus proceeding, the petitioner appealed to the Virginia Supreme Court. *See id.* at 727. Under Virginia law, failure to file a notice of appeal with the trial court within 30 days of a final judgment constitutes a waiver of any further right of appeal. *See id.* The petitioner's lawyer missed the filing deadline by three days. *See id.*

The United States Supreme Court noted that, by failing to comply with the state procedural rule, the petitioner had completely relinquished his right to appeal his conviction and sentence in state court. *See id.* at 728. Furthermore, because the default rested on an independent and adequate state law ground, the Court held that federal review of the claims raised in the first state habeas corpus proceeding also was barred. *See id.* at 728-30 (explaining that the "independent and adequate state ground" doctrine "applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement").

Most significantly, the *Coleman* Court rejected the petitioner's assertion that counsel's failure to file a timely notice of appeal constituted ineffective assistance of counsel and, thus, sufficient cause to excuse the default. *See id.* at 757. Applying the rule established in *Pennsylvania v. Finley* and *Murray v. Giarratano*, that there is no constitutional right to counsel in state post-conviction proceedings, the *Coleman* Court first determined that the petitioner had no right to counsel on appeal from the ruling of the state habeas trial court.

prisoner demonstrates that external barriers prevented his lawyer from formulating and presenting claims in a proper or timely fashion.[96]

The Court has devoted far less attention to the development of the prejudice prong, having held only that errors which impose an "actual and substantial disadvantage," infecting the entire trial process with constitutional error, constitute sufficient prejudice to overcome procedural default.[97] Under a more narrow exception, the Court held that a petitioner who is unable to show adequate cause and prejudice nonetheless may present defaulted claims in a federal habeas proceeding if failure to consider them would constitute "a miscarriage of justice."[98]

Notwithstanding how the cause and prejudice standard has constrained federal habeas jurisdiction, certain limited exceptions to that standard permit the resurrection of defaulted claims.[99] First, a meritorious claim of ineffective assistance of counsel can cure a procedural default.[100] The Court has held that the ineffective assistance of counsel provides cause

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See id. at 755; *see also* Murray v. Giarratano, 492 U.S. 1, 12 (1989) (plurality opinion) (concluding that death-row prisoners have no constitutional right to appointed counsel in state post-conviction proceedings); Pennsylvania v. Finley, 481 U.S. 551, 559 (1987) (holding that state prisoners are not constitutionally entitled to appointed counsel in seeking state post-conviction review). The Court reiterated that the constitutional requirement of the effective assistance of counsel applies only when the right to counsel attaches. *See Coleman*, 501 U.S. at 752; *see also* Wainwright v. Torna, 455 U.S. 586, 587-88 (1982) (per curiam) (holding that the right to counsel is a prerequisite to the applicability of the right to the effective assistance of counsel). Thus, the Court concluded that "[b]ecause [the petitioner] had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of [the petitioner's] claims in state court cannot constitute cause to excuse the default in federal habeas." *Coleman*, 501 U.S. at 757; *see also* Inafuku, *supra* note 69, at 649-50 (explaining that because the petitioner in *Coleman* had no right to counsel in collateral proceedings, his ineffective assistance claim did not constitute "cause" to excuse the default in state court).

96. *See Carrier*, 477 U.S. at 488, 492.

97. United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis omitted). In *Frady*, the prisoner's claim rested on an improper jury instruction of "malice" that precluded the jury from considering the lesser-included offense of manslaughter. *See id.* at 157-58. The prisoner had not argued the lesser-included offense at trial, instead maintaining his innocence despite overwhelming evidence of his guilt. *See id.* at 171. Therefore, the Court reasoned that the erroneous instruction was inconsequential and, thus, did not constitute "prejudice." *See id.* at 171-72.

98. *See* Wainwright v. Sykes, 433 U.S. 72, 91 (1977) (adopting, but not defining, the "miscarriage of justice" exception to the "cause and prejudice" standard).

99. *See* Clarke, *supra* note 64, at 337-44 (listing various avenues of relief from procedural default).

100. *See Coleman*, 501 U.S. at 754 (explaining that a state bears the burden for procedural default due to the ineffective assistance of counsel because "the Sixth Amendment itself requires that responsibility for the default be imputed to the State"); *see also* United States v. Cronic, 466 U.S. 648, 659 (1984) (noting that the absolute denial of counsel renders the adversary process presumptively unreliable).

and, as a Sixth Amendment violation, implicates sufficient prejudice to overcome procedural default.[101] Successful claims of ineffective assistance are rare.[102] Thus, the prospect of remedying procedural default in cases involving the ineffective representation is remote.[103]

Second, procedural default may be overcome by demonstrating that improper state interference prevented the timely assertion of a valid claim.[104] Claims of state interference generally are unavailing because defense counsel seldom discover such misconduct.[105]

Judicial recognition of a novel constitutional claim in a federal habeas corpus proceeding is a third exception.[106] The Supreme Court has limited this exception by holding that new constitutional rules announced in federal habeas corpus proceedings generally will not be applied retroactively to final convictions, that is, convictions that have been affirmed on direct review by a state court of last resort prior to the new rules' announcement.[107] Yet state post-conviction proceedings and federal habeas corpus review are available only after a conviction is affirmed on direct appeal by a state court of last resort.[108] Thus, even if a petitioner suc-

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101. *See Carrier*, 477 U.S. at 488 (explaining that the Sixth Amendment requires the State to shoulder the responsibility for defaulted claims that are attributed to the ineffective assistance of counsel); *see also* Clarke, *supra* note 64, at 337-38 (explaining that ineffective assistance of counsel supplies both "cause" and "prejudice" to cure procedural default). *But see* Wainwright v. Torna, 455 U.S. 586, 587-88 (1982) (per curiam) (holding that there can be no claim of ineffective assistance of counsel where the constitutional right to counsel does not apply).

102. *Cf. supra* notes 46-54 and accompanying text (discussing the constitutional standard of the effective assistance of counsel).

103. *See* Clarke, *supra* note 64, at 338 (observing that claims of ineffective assistance of counsel rarely provide relief from procedural default); *see also* 28 U.S.C.A. § 2261(e) (West Supp. 1997) ("The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief . . . .").

104. *See* Amadeo v. Zant, 486 U.S. 214, 222 (1988) (acknowledging that the government's concealment of evidence revealing a pattern of minority discrimination in jury pools constituted improper state interference and, thus, established sufficient cause to excuse a procedural default); *see also* Clarke, *supra* note 64, at 341 (discussing the possible resurrection of defaulted claims lost due to deliberate state interference).

105. *Cf.* McCleskey v. Zant, 499 U.S. 467, 474 (1991) (reporting that the State withheld evidence of a deliberate violation of the defendant's constitutional right against self-incrimination until one month before he filed a second application for federal habeas corpus review challenging his conviction and capital sentence).

106. *See* Reed v. Ross, 468 U.S. 1, 16 (1984) (holding that cause could be established if a petitioner raised a claim "so novel that its legal basis [was] not reasonably available to counsel"); *see also* Mello & Duffy, *supra* note 60, at 494 (explaining that novelty of a federal constitutional claim supplies sufficient cause to overcome default).

107. *See* Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion) (adopting the nonretroactivity rule).

108. *See* Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) (noting that post-conviction

ceeds in convincing a court to recognize a new constitutional rule, the petitioner's claim typically is barred from consideration by the retroactivity rule.[109]

Lastly, the "miscarriage of justice" exception allows a petitioner in rare circumstances to present defaulted claims in federal habeas proceedings.[110] Under this exception, petitioners who are unable to demonstrate sufficient cause and prejudice nevertheless may present defaulted claims in "extraordinary case[s] where a constitutional violation has probably resulted in the conviction of one who is actually innocent."[111] The Court, however, has held that a capital petitioner is not entitled to federal habeas review on an "actual innocence" claim based on newly discovered evidence absent an independent constitutional claim.[112] Finally, a petitioner asserting a claim of "legal innocence" of the death penalty must show by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under applicable state law.[113]

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review is not an element of the criminal proceeding, but rather, a collateral attack that occurs only after the completion of direct appellate review.).

109. *See infra* notes 127-51 and accompanying text (discussing the doctrine of nonretroactivity).

110. *See* Schlup v. Delo, 513 U.S. 298, 321 (1995) (explaining that the purpose of linking the "miscarriage of justice" exception to a petitioner's innocence is to ensure that the exception is available only in "extraordinary cases"); Smith v. Murray, 477 U.S. 527, 537 (1986) (stating that "miscarriage of justice" intimates "actual" rather than "legal" innocence); *see also* Clarke, *supra* note 64, at 340 (contending that few claims can satisfy the "miscarriage of justice" exception).

111. Murray v. Carrier, 477 U.S. 478, 496 (1986); *see also* Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion) (determining that the "miscarriage of justice" exception permits federal courts to address successive claims if the prisoner can establish a "colorable claim of factual innocence"); Clarke, *supra* note 64, at 339 (noting that *Carrier* recognized a new formulation of the "miscarriage of justice" exception that applied to defaulted claims).

112. *See* Herrera v. Collins, 506 U.S. 390, 404 (1993) (holding that the "miscarriage of justice" exception is available only when a petitioner asserts a constitutional claim attendant "with a colorable showing of factual innocence"). The *Herrera* Court stated that the aim of habeas corpus is to "ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact." *Id.* at 400. The Court characterized the "actual innocence" standard as a "gateway" through which a petitioner must traverse to resurrect barred constitutional claims. *See id.* at 404; *see also* Tara L. Swafford, Note, *Responding to* Herrera v. Collins: *Ensuring that Innocents Are Not Executed*, 45 CASE W. RES. L. REV. 603, 615 (1995) (referring to *Herrera* as a "green light to execute innocent people") (quoting Diann Rust-Tierney, Director of the ACLU's capital punishment project).

113. *See* Sawyer v. Whitley, 505 U.S. 333, 346-47, 350 (1992) (noting that the "legal innocence" standard focuses only on the elements that render a petitioner eligible for the death penalty); *see also* Clarke, *supra* note 64, at 339-40 (explaining the incredible difficulty in satisfying the *Sawyer* standard). First, *Sawyer* requires a petitioner to demonstrate that, absent constitutional error, an objective, rational trier-of-fact would have reason to

B. Exhaustion Doctrine

The exhaustion doctrine is a procedural rule that requires state prisoners to raise constitutional claims in state courts before invoking federal habeas corpus jurisdiction.[114] Rooted in principles of federalism and comity, the exhaustion doctrine affords state courts an initial opportunity to correct constitutional error.[115] Traditionally, exhaustion of state remedies was not a condition precedent to federal habeas corpus jurisdiction.[116] The Supreme Court reasoned that the overriding interest of pre-

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doubt the petitioner's eligibility for the death penalty, that is, whether the probative evidence establishes the prerequisite aggravating circumstances under state law. *See Sawyer*, 505 U.S. at 346. The introduction of factual evidence relevant to the sentencing phase, either supporting the absence of aggravating factors or establishing the existence of mitigating factors that were barred from consideration, will not excuse default because these considerations are germane only after the antecedent issue of death penalty eligibility has been determined. *See* Clarke, *supra* note 64, at 340. Second, the objective, "reasonable person" standard of review forecloses any realistic chance of success except in rare instances where constitutional error displaces all probative evidence supporting death penalty eligibility. *See id.*

114. *See* Rose v. Lundy, 455 U.S. 509, 520 (1982) (plurality opinion) (warning that before a state prisoner's claims may be considered on the merits in a federal habeas corpus proceeding, the prisoner first must litigate each claim in state court). The exhaustion doctrine is codified at 28 U.S.C. § 2254 which, prior to the passage of the AEDPA, provided, in pertinent part, that:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254 (b)-(c) (1994); *see also* Levit, *supra* note 7, at 73 (noting that exhaustion of state remedies is a prerequisite to federal habeas review); *infra* note 186 (providing the amended language of Section 2254(b)).

115. *See, e.g.*, *Rose*, 455 U.S. at 518-19 (plurality opinion) (asserting that the exhaustion rule will furnish states with an initial opportunity to correct constitutional error); *Ex parte* Hawk, 321 U.S. 114, 117 (1944) (noting that exhaustion precludes federal judicial interference in the administration of state courts save exceptional circumstances); United States, *ex rel.* Kennedy v. Tyler, 269 U.S. 13, 17-19 (1925) (requiring dismissal of a petition containing claims not raised in state court).

116. *See* Fay v. Noia, 372 U.S. 391, 430 (1963) (explaining that the broad power of the federal courts to grant the writ of habeas corpus is not concerned with the judgments of state courts), *overruled by* Coleman v. Thompson, 501 U.S. 722 (1991). The *Fay* Court held that an allegation of unlawful detention or restraint triggers federal habeas jurisdiction. *See id.* at 426-27. The Court reasoned that rigid enforcement of the exhaustion rule would serve only to frustrate the writ's sacrosanct purpose of ensuring the vitality of fundamental freedom. *See id.* at 423-24. *But see Carrier*, 477 U.S. at 489 (noting that allowing federal courts to reverse state convictions without first affording states an opportunity to

serving individual liberty justified the federal judiciary's intrusion into the business of the states.[117] As judicial deference of state procedural rules grew, however, the Court continued to redefine the relationship between the exhaustion rule and federal habeas corpus, placing greater emphasis on respecting policies of federalism, comity, and judicial economy.[118]

The Court's retreat from the traditional exhaustion rule began with *Rose v. Lundy*.[119] In *Rose*, the Court held that federal courts were required to dismiss "mixed" habeas corpus petitions, those containing both exhausted and unexhausted claims.[120] The Court relied on the principles

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correct constitutional errors contravenes judicial comity).

117. *See Fay*, 372 U.S. at 426 ("[F]ederal [habeas corpus] jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings.").

118. *See* Castille v. Peoples, 489 U.S. 346, 349 (1989) (recognizing that respect for comity underlies the exhaustion requirement); *Carrier*, 477 U.S. at 488-89 (explaining how the exhaustion doctrine benefits the principle of comity); *cf.* Coleman v. Balkcom, 451 U.S. 949, 959 (1981) (Rehnquist, J., dissenting from denial of certiorari) (commenting that habeas corpus "has made it virtually impossible for States to enforce with reasonable promptness their constitutionally valid capital punishment statutes"); *see also* Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1675 (1990) (commenting that Chief Justice Rehnquist has been an outspoken advocate of habeas reform); Smith & Jones, *supra* note 80, at 54 (arguing that Presidents Ronald Reagan and George Bush selected Supreme Court nominees who were likely to reverse the liberal holdings of earlier Courts).

119. 455 U.S. 509 (1982).

120. *See id.* at 510. The Court conceded that dismissal of mixed petitions would leave petitioners with the unenviable choice either of returning to state court to complete exhaustion or revamping their federal habeas petitions to include only exhausted claims. *See id.* The Court maintained that the absence of any reference to mixed petitions in the legislative history of the federal habeas statute suggested that Congress did not anticipate this later development. *See id.* at 516-17. This left the Court to define the role that exhaustion would play in federal courts in light of public policy considerations. *See id.*

The exhaustion statute provided, in part, that a petition for federal habeas corpus proffered by a petitioner in state custody "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C.A. § 2254(b) (1994). Furthermore, section 2254(c) provided that a claim is not exhausted if a state procedure is available in which a petitioner may present the claim. *See id.* § 2254(c). In *Brown v. Allen*, the Court considered the relationship between section 2254(b) and (c). *See* 344 U.S. 443, 447-48 (1953). The Court reconciled any perceived discrepancy between section 2254(b) and (c), concluding that once a state court has addressed an issue on direct appeal, a petitioner is not required to further pursue state post-conviction review of the same claim in order to satisfy the exhaustion requirement. *See id.* at 447-48; *see also* Castille v. Peoples, 489 U.S. 346, 350 (1989) (stating that a strict reading of Section 2254(c) indicates that exhaustion is not satisfied "if there exists any possibility of further state-court review"). The *Brown* Court concluded that Section 2254 did not require repeated state judicial review of previously adjudicated claims. *See* 344 U.S. at 448 n.3; *see also* Clarke, *supra* note 23, at 1381 (explaining that fair presentation of a claim satisfies the ex-

of federalism and comity to defend the strict exhaustion rule that marked a significant departure from traditional habeas corpus jurisprudence.[121] After *Rose*, the exhaustion doctrine no longer reflected federal respect for comity and administrative convenience, but assumed a more affirmative role as a prerequisite to the exercise of federal habeas corpus jurisdiction.[122]

Later Supreme Court decisions placed even greater emphasis on the exhaustion doctrine.[123] For example, the Court held that the exhaustion doctrine requires that claims of ineffective assistance of counsel be presented independently in state court before they can be raised to cure procedural default in federal habeas proceedings.[124] The Court also determined that a claim first presented in a discretionary appeal, which the state court declines to consider, does not constitute a "fair presentation" for exhaustion purposes.[125] Lastly, the Court once held that when a state

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haustion requirement when it has been presented to the highest state court, and that repeated state court review unnecessarily could prevent federal habeas review due to a petitioner's inability to exhaust unavailable state remedies). The Court acknowledged another exception to the exhaustion requirement in *Duckworth v. Serrano*. *See* 454 U.S. 1, 3 (1981) (per curiam). In that case, the Court held that the exhaustion doctrine would not bar federal habeas review when state remedies are so deficient that the pursuit of relief is futile. *See id.*

121. *Compare Rose*, 455 U.S. at 518 (plurality opinion) (maintaining that the exhaustion doctrine prevents the federal courts from interfering with state judicial administration); *with Fay*, 372 U.S. at 426-27 (holding that federal habeas corpus supersedes state procedural rules because of the writ's underlying social policies). *See* Levit, *supra* note 7, at 73 (arguing that the exhaustion rule threatens the failure of even valid constitutional claims); Mello & Duffy, *supra* note 60, at 489-90 (characterizing the exhaustion rule as a "trap" for the uneducated and a difficult procedural obstacle to overcome when pursuing federal habeas relief).

122. *See* Picard v. Connor, 404 U.S. 270, 278 (1971) (holding that exhaustion requires that the substance of a federal habeas claim first must be presented in state court); *see also* Clarke, *supra* note 23, at 1388 (noting that while "[t]he exhaustion doctrine began as a discretionary concept predicated upon comity . . . [it has] in some ways come to mimic jurisdictional concepts").

123. *See infra* notes 124-26 and accompanying text (discussing the strict enforcement of the exhaustion requirement).

124. *See* Murray v. Carrier, 477 U.S. 478, 488-89 (1986). The *Carrier* Court reasoned that if prisoners were permitted to raise ineffective assistance claims for the first time in federal habeas proceedings to cure procedural default, the federal courts would be placed in the anomalous position of addressing unexhausted claims despite the existence of available state court remedies. *See id.* at 489. *But see generally* Bonnie, *supra* note 1, at 113 (suggesting that it is ironic that state officials, who presumably want to accelerate the collateral review process, likely would oppose the abandonment of the exhaustion requirement).

125. *See Castille*, 489 U.S. at 351. In *Brown*, the Court held that once the state courts have passed on a claim, it is unnecessary "to ask the state for collateral relief, based on the same evidence and issues already decided by direct review." 344 U.S. at 447. In *Smith v. Digmon*, the Court held that exhaustion is satisfied when a claim is properly presented on

prosecutor fails to object to the presentation of unexhausted claims in federal habeas review, district courts should address only those claims that would further the administration of justice.[126]

C. Nonretroactivity

The doctrine of nonretroactivity is one of the most restrictive procedural barriers to habeas corpus review erected by the Supreme Court.[127] Federal courts employ the retroactivity standard to determine whether new constitutional rules of criminal procedure should apply retroactively to benefit other prisoners who are similarly situated.[128] In *Teague v. Lane*,[129] the Court adopted a stringent retroactivity rule that severely curtailed the scope of federal habeas corpus.[130] In *Teague*, the Court held

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direct review despite a state court's failure to address it explicitly. *See* 434 U.S. 332, 333 (1978) (per curiam). The *Castille* Court observed that in both *Brown* and *Digmon*, further pursuit of state remedies was futile. *See* 489 U.S. at 350. The Court determined, however, that this rationale did not apply "where the claim [is] presented for the first and only time in a procedural context in which its merits will not be considered unless there are special and important reasons therefor." *Id.* (internal quotation marks omitted). Accordingly, the Court concluded that "[r]aising the claim in such a fashion does not . . . constitute fair presentation." *Id.* (internal quotation marks omitted).

126. *See* Granberry v. Greer, 481 U.S. 129, 131 (1987) (concluding that district courts have the discretion to determine whether the administration of justice is served in a particular case). The limited applicability of *Granberry* stems from the fact that state prosecutors rarely will forgo an opportunity to object to the presentation of unexhausted claims. *See* Clarke, *supra* note 23, at 1385. If a petitioner is forced to return to state court to satisfy the exhaustion requirement after the time allowed for seeking an appeal has expired, the petitioner's untimely presentation of the claims may create a procedural default. *See id.* Therefore, *Granberry* generally applies only when a state has waived the exhaustion requirement concerning frivolous claims, freeing the state from engaging in needless litigation. *See id.*

State prisoners seeking federal habeas corpus relief may face additional dangers in satisfying the exhaustion requirement. *See id.* at 1380. For example, although a petitioner seeking federal habeas review is required to present the same substantive claims previously litigated in state court, the state and federal pleading requirements may vary significantly. *See id.* Thus, the improper transposition of the substantive claims from state to federal pleadings may provide a federal court with sufficient grounds to interpret the claims contained in the federal petition as "new," and thus, unexhausted. *See id.*

127. *See* Clarke, *supra* note 64, at 304 (considering the significant impact of the nonretroactivity doctrine on the interaction between the state courts and federal habeas corpus proceedings).

128. *See* Sawyer v. Smith, 497 U.S. 227, 233 (1990) (employing the retroactivity standard to determine whether a state prisoner can benefit from a new rule that was announced after his conviction became final); *see also* Clarke, *supra* note 64, at 304 (arguing that whether a new rule that is announced in a federal habeas corpus proceeding may be applied retroactively to overturn a state criminal conviction largely turns on "how faithful state supreme courts must be toward Supreme Court precedent").

129. 489 U.S. 288 (1989) (plurality opinion).

130. *See id.* at 301, 311, 312.

that new constitutional rules established in federal habeas corpus proceedings customarily shall not apply retroactively to state convictions that became final prior to the date the rule was announced.[131]

Under the *Teague* retroactivity rule, only certain new rules of constitutional law may be applied retroactively.[132] The *Teague* Court defined "new rule" ambiguously, stating that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government."[133]

The Court emphasized that judges must determine whether a new rule should apply retroactively as a threshold issue.[134] Thus, unless a petitioner first satisfies the retroactivity standard, the Court will not announce or apply a new rule in that case.[135] The Court sought to ensure that constitutional rules are uniformly applied, reasoning that "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[136] The Court also stressed that the strict retroactivity standard reflected the importance of finality that is crucial to the proper functioning of the criminal justice system.[137] Moreover, the *Teague* Court rationalized that habeas corpus review based on subsequent changes in constitutional interpretation, rather than the law in effect at the time of conviction, is not essential to fulfilling the writ's objective of compelling

131. *See id.* at 310.

132. *See* Penry v. Lynaugh, 492 U.S. 302, 313 (1989) (explaining that the first step in applying the retroactivity rule is deciding "whether granting [the petitioner] the relief he seeks would create a 'new rule'"). *Teague* was not a capital case. *See Teague*, 489 U.S. at 314 n.2 (plurality opinion). Thus, the plurality did not decide how the retroactivity standard would apply with regard to capital sentencing proceedings. *See id.* The Court revisited this issue in *Penry*. *See* 492 U.S. at 314. In *Penry*, the Court reasoned that the respect for finality in criminal trials that justified modifying the retroactivity rule in *Teague* was equally applicable in the context of a capital sentencing proceeding. *See id.* at 313-14. Therefore, the Court decided that the retroactivity standard adopted in *Teague* applied in both settings. *See id.*

133. *Teague*, 489 U.S. at 301 (plurality opinion). The *Teague* Court also defined a "new rule" explaining that "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* *But see* Clarke, *supra* note 64, at 311-12 (explaining that rarely are decisions on appeal or collateral review "dictated" by precedent (quoting *Teague*, 489 U.S. at 334 (Brennan J., dissenting))).

134. *See Teague*, 489 U.S. at 300 (plurality opinion) (requiring that in cases involving the applicability of retroactivity and a new constitutional rule, "the retroactivity issue should be decided first" (quoting Bowen v. United States, 422 U.S. 916, 920 (1975))).

135. *See id.* at 316.

136. *Id.* at 300.

137. *See id.* at 309 (maintaining that the criminal law loses much of its deterrent effect when finality is compromised).

lower courts to adhere to "established constitutional standards."[138]

The Court provided two narrow exceptions in which a new constitutional rule may be applied retroactively: (1) the rule must place certain types of primary, private conduct beyond the power of the criminal law; or (2) the rule is a "watershed" rule of criminal procedure, fundamental to the fairness of the proceeding, and central to the accurate determination of guilt or innocence.[139]

The first exception permits retroactive application of new rules that place private conduct or persons beyond the reach of criminal law.[140] The exception is inapplicable in habeas corpus review of capital cases, however, because it is doubtful that murder will be decriminalized.[141] Moreover, having recently considered whether the insane,[142] juveniles,[143] and the mentally retarded[144] may be executed,[145] the Court will not likely render any other significant classes of persons or types of conduct ineligible for the death penalty.[146]

The second exception, which permits the retroactive application of new "watershed" rules that are central to the accurate determination of

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138. *See id.* at 306-07 (insisting that "[r]eview on habeas to determine that the conviction rests upon correct application of the law in effect at the time of the conviction is all that is required to force trial and appellate courts . . . to toe the constitutional mark" (quoting Solem v. Stumes, 465 U.S. 638, 653 (1984) (Powell, J., concurring in judgment))).

139. *See id.* at 311, 312-13; *see also* Berger, *supra* note 118, at 1703 (stating that *Teague* encourages petitioners to prolong the collateral review process to avoid imposition of the death penalty).

140. *See Teague*, 489 U.S. at 311 (plurality opinion).

141. *See* Levit, *supra* note 7, at 77 (noting that "it is difficult to imagine a new rule in a capital case that would make the activity for which a death sentence was imposed not a crime. While decriminalization of drugs is presently a hot topic, decriminalization of first degree murder is not").

142. *See* Ford v. Wainwright, 477 U.S. 339, 410 (1986) (prohibiting the execution of the insane).

143. *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (plurality opinion) (concluding that the execution of a person who commits murder at the age of 16 or 17 does not violate the Eighth Amendment's prohibition against cruel and unusual punishment). *But see* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (plurality opinion) (concluding that the Eighth Amendment forbids the imposition of capital punishment on any person who was younger than 16 years of age at the time of his or her offense).

144. *See* Penry v. Lynaugh, 492 U.S. 302, 338 (1989) (concluding that the execution of mentally retarded people is not categorically prohibited by the Eighth Amendment).

145. *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that imposition of the death penalty for rape violates the Eighth Amendment proscription against cruel and unusual punishment); *see also* Clarke, *supra* note 64, at 307-08 (reviewing the expansion of exclusions placing classes of conduct and persons beyond the reach of capital punishment).

146. *See* Levit, *supra* note 7, at 77 (explaining that the first exception is not likely to expand because no significant categories of conduct or persons remain unaddressed).

guilt or innocence, also is elusive in capital cases.[147] For example, where petitioners have asserted claims implicating the accurate determination of guilt or innocence, the Court has refused to characterize the rules as fundamental to procedural fairness.[148] Similarly, *Teague* illustrated a less apparent consequence of the nonretroactivity doctrine.[149] Because *Teague* involved a novel constitutional claim raised in a habeas corpus proceeding after the petitioner's conviction became final, a favorable ruling on the claim would have applied retroactively only if it qualified under an exception to the retroactive bar.[150] The Court determined that a prosecutor's deliberate elimination of blacks from a jury pool did not

147. *See* Teague v. Lane, 489 U.S. 288, 313 (1989) (plurality opinion) (assuming that it is unlikely that many of the bedrock procedures that would satisfy the accuracy prong have yet to emerge); *see also* Berger, *supra* note 118, at 1702 (noting that *Teague*'s second exception refers to "bedrock" rules of criminal procedure that implicate the "accurate determination" of a proceeding); Clarke, *supra* note 64, at 308 (commenting on the difficulty of satisfying both elements of the second *Teague* exception); Levit, *supra* note 7, at 77 (referring to the narrowness of the second *Teague* exception).

148. *See* Sawyer v. Smith, 497 U.S. 227, 244-45 (1990) (deciding that the petitioner's claim related only to the accuracy of capital sentencing proceedings and was not a fundamental rule of criminal procedure). *Sawyer* involved a prosecutor who misled a capital sentencing jury by suggesting that their decision whether to impose the death penalty would be merely a "recommendation." *See id.* at 230-31. The petitioner was sentenced to death and his conviction became final on April 2, 1984. *See id.* at 232. On June 11, 1985, the Supreme Court decided *Caldwell v. Mississippi*, holding unconstitutional a death sentence imposed "by a [jury] who [was] led to believe that the responsibility for determining the appropriateness of the [sentence] rests elsewhere." 472 U.S. 320, 328-29 (1985). The *Sawyer* Court held that although *Caldwell* announced a new constitutional rule, the petitioner could not benefit from the new rule because the Court decided *Caldwell* after the petitioner's conviction became final. *See* 497 U.S. at 238. The Court next concluded that the procedural rule recognized in *Caldwell* implicated the accuracy prong, but did not constitute an "absolute prerequisite to fundamental fairness of the type that may come within *Teague*'s second exception." *Id.* at 244. (internal quotation marks omitted). Accordingly, the Court refused to apply the new constitutional rule announced in *Caldwell* to the petitioner's sentence. *See id.* at 245; *see also* Clarke, *supra* note 64, at 308 (citing *Sawyer* as an example "[w]here a case has involved the accuracy or integrity of the process, [but] the Court has found that the [new] rule was not sufficiently implicit in the concept of ordered liberty to constitute a watershed rule of criminal procedure" (quoting *Teague*, 489 U.S. at 311 (plurality opinion) (internal quotation marks omitted)).

149. *See Teague*, 489 U.S. at 292-93 (plurality opinion). The petitioner in *Teague*, a black male convicted of attempted murder, challenged his conviction on the ground that the prosecution used all its peremptory challenges to exclude blacks from the jury pool. *See id.*

150. *See id.* at 311; *see also* Levit, *supra* note 7, at 78 (noting that even a favorable ruling on the petitioner's claim would not have provided relief, because the petitioner raised the claim after his conviction became final and it did not fall under one of the two *Teague* exceptions).

satisfy either prong and declined to consider the petitioner's claim altogether.[151]

Capital petitioners face formidable dangers in pursuing habeas corpus relief. In state post-conviction proceedings, where procedural default, exhaustion, and other procedural traps inflict often incurable wounds, a petitioner has no constitutional right to appointed counsel to warn him of the dangers which he may not know or comprehend.[152]

III. ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996: HISTORICAL DEVELOPMENT AND POTENTIAL IMPACT IN CAPITAL CASES

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996[153] (Act) in reaction to a growing public dissatisfaction with delays in the administration of capital punishment.[154] With respect to state-imposed capital sentences, the Act fundamentally alters the role of federal habeas corpus by removing barriers to the orderly resolution of capital litigation.[155] The Act also aspires to provide indigent capital defen-

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151. *See Teague*, 489 U.S. at 316 (plurality opinion). One commentator has noted a less evident consequence of *Teague*:

> *Teague* walks state habeas petitioners into a virtually inescapable box. When a petitioner establishes the essential prerequisite to avoid the procedural default bar—the novelty of the claim—he proves a new rule under *Teague* which precludes consideration of his claim. Those who have committed a procedural default because the tools to establish the claim were not reasonably available at the time of trial have proven the new rule element in *Teague*.

Levit, *supra* note 7, at 78 (internal footnotes omitted).

152. *See* Giarratano v. Murray, 668 F. Supp. 511, 513 (E.D. Va. 1986) (concluding that a prisoner facing execution is unable to pursue his constitutional claims properly without adequate legal assistance), *aff'd*, 847 F.2d 1118 (4th Cir. 1988) (en banc), *rev'd*, 492 U.S. 1 (1989) (plurality opinion); Falzerano v. Collier, 535 F. Supp. 800, 803 (D.N.J. 1982) (stating that "[t]o expect untrained [prisoners] to work with entirely unfamiliar [law] books, whose content they cannot understand . . . hardly satisfies the substance of the constitutional duty [to provide meaningful access to the courts]"); *see also* Clarke, *supra* note 23, at 1329 (predicting that procedural barriers will deter most habeas corpus petitions); Levit, *supra* note 7, at 80 (suggesting that because of the unique and complex nature of the death penalty, the absence of counsel in post-conviction proceedings is equivalent to a denial of meaningful access to the courts).

153. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended at 28 U.S.C.A. §§ 2261-66 (West Supp. 1997)).

154. *See House Report*, *supra* note 15, at 8 (reporting that the provisions of Title I are designed principally to curb delay and repetitive litigation in capital cases).

155. *See supra* note 16 (listing various procedural components contained in the AEDPA that are designed to deter needless delay in capital cases).

dants with the otherwise unavailable assistance of competent counsel in state post-conviction proceedings.[156]

A. The Powell Committee

In June 1988, the Chief Justice of the Supreme Court, William H. Rehnquist, formed the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (Powell Committee or Committee).[157] The Committee's purpose was to examine "the necessity and desirability of legislation directed toward avoiding delay and the lack of finality in capital cases in which the prisoner had or had been offered counsel."[158] The Powell Committee identified as a principle source of delay the fact that death-row prisoners have considerable incentive to prolong the collateral review process to avoid the imposition of their sentence.[159] Because neither a statute of limitations nor res judicata applied in habeas corpus proceedings, the Committee reasoned that capital prisoners do not initiate and pursue collateral remedies.[160] The Committee also identified the lack of state-federal judicial coordination, repetitive filings, and last-minute litigation as additional sources of delay.[161] The Committee proposed

156. *See House Report*, *supra* note 15, at 10 (explaining that Chapter 154 "would fill the gap in representation for indigent capital defendants in state [post-conviction] proceedings").

157. *See Powell Committee Report*, *supra* note 15, at 3239. Chief Justice Rehnquist appointed retired Associate Justice Lewis Powell, Jr. as Committee chairman. *See id.* Also appointed were two circuit judges and two district court judges from the Fifth and Eleventh Circuits. *See id.*; *see also* Berger, *supra* note 118, at 1675 n.62 (reporting that "[a]s of July 1989, almost 40% of death row inmates had been convicted and sentenced in the six states comprising [the Fifth and Eleventh] circuits"). The Committee met six times over fifteen months, solicited written comments and suggestions from an array of interested individuals and organizations, and ultimately promulgated a battery of legislative proposals that, in part, was adopted under Title I of the Act. *See id.* at 1675. *But see id.* (contending that Chief Justice Rehnquist, an outspoken advocate of capital habeas reform, hand-picked the Powell Committee as a provincial group comprised of individuals whose philosophies were likely to mirror his own).

158. *Powell Committee Report*, *supra* note 15, at 3239 (internal quotation marks omitted). The Powell Committee's proposal reflected the belief that the multi-layered system of state and federal appellate and collateral review in capital cases was inefficient, facilitating inordinate and needless delay between sentencing and execution. *See id.* The Committee concluded that the lack of finality inherent in the judicial scheme undermined public confidence in the criminal justice system. *See id.*

159. *See id.*

160. *See id.*

161. *See id.* at 3239-40. *But see ABA Report*, *supra* note 44, at 16 (maintaining that the lack of competent counsel in state post-conviction proceedings is the principal shortcoming of collateral review); Mello & Duffy, *supra* note 60, at 458 (arguing that the lack of competent counsel to represent indigent death-row inmates in all stages of the judicial process and the increasing complexity of habeas litigation are the real sources of delay in

statutory amendments to correct these deficiencies, many of which were adopted under Title I of the Act.[162]

The Powell Committee's goal in reforming capital habeas corpus review was to design a fair and efficient system that afforded petitioners "one complete and fair course of collateral review in the state and federal system."[163] Recognizing that a dearth of qualified lawyers to represent death-row inmates in state post-conviction proceedings further delayed capital litigation,[164] the Committee sought to fill the gap between the constitutional right to counsel at trial[165] and on direct appeal,[166] and the statutory right to counsel in federal habeas corpus proceedings provided under the Anti-Drug Abuse Act of 1988.[167] Under the Powell Committee's proposal,[168] states could opt-in to an expedited system of collateral review if they established a program to appoint, compensate, and pay reasonable litigation expenses of competent counsel, pursuant to binding state law, to represent indigent death-row inmates in state post-conviction proceedings.[169]

The Committee believed that a system of collateral review should "be

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capital litigation).

162. *See* 28 U.S.C.A. §§ 2261-66 (West Supp. 1997).

163. *Powell Committee Report*, *supra* note 15, at 3240. Although the proposal sought to provide "one complete and fair course of collateral review in state and federal system," the Committee candidly opined that absent discovery of constitutional error, judicial review should cease. *Id.*

164. *See id.* (noting that a "serious problem with the current system is the pressing need for qualified counsel to represent inmates in collateral review").

165. *See* Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963) (holding that the Sixth Amendment requires states to provide indigent defendants appointed counsel in all criminal prosecutions involving the prospect of significant incarceration); Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that states must provide appointed counsel to indigents in capital cases).

166. *See* Douglas v. California, 372 U.S. 353, 355-56 (1963) (requiring that states provide indigent defendants with appointed counsel on first appeals of right).

167. *See* 21 U.S.C. § 848(q)(4)(B) & (q)(6) (1994); *see also supra* note 11 (providing the language of Section 848(q)(4)(B) & (q)(6)).

168. *See* Berger, *supra* note 118, at 1679 (characterizing the Committee's plan as quid pro quo). With respect to the Powell Committee's proposal, Professor Berger explains:

> The key feature of this scheme . . . is its entirely *voluntary* nature . . . . If a state takes up the option, it receives the benefits. Otherwise, the ordinary ground rules of habeas apply. Simply put, the Powell Committee dangles various procedural carrots before states that have been as stubborn as donkeys in refusing to ensure adequate assistance by qualified lawyers to death-sentenced post-conviction petitioners, in the hope that the carrots will prove sufficiently tasty to lure jurisdictions into the system.

Id. at 1678-79.

169. *Cf.* 28 U.S.C.A. § 2261 (b)-(c) (West Supp. 1997) (providing the requirements that states must satisfy to "opt-in" to Chapter 154's procedural scheme).

fair, thorough and the product of capable and committed advocacy."[170] The Committee reasoned, however, that the state-federal balance is best served by affording states considerable latitude in formulating appointment systems.[171] States should be accorded sufficient flexibility, according to the Committee, to devise appointment programs that are tailored to address their specific needs.[172] Chapter 154 adopted, virtually verbatim, the Powell Committee's proposals concerning the appointment of post-conviction counsel in state post-conviction proceedings.[173]

B. Federal Habeas Corpus Procedures in Capital Cases

1. Section 101: Statute of Limitations for Filing Writ of Habeas Corpus Following Final Judgment of a State Court

Title I of the Act amended existing law by imposing a mandatory one-year statute of limitations for state prisoners to file habeas corpus petitions in federal courts.[174] Generally, the statute of limitations begins to run once a conviction is final under state law.[175] This modification is sig-

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170. *Powell Committee Report*, *supra* note 15, at 3242. In the Committee's opinion, only attorneys with the "clear ability and willingness to handle capital cases" should be eligible for appointment in state post-conviction proceedings. *Id.* The proposal provided that "[u]nless a State takes the *affirmative steps* required . . . its litigation of capital cases under [the federal habeas corpus statute] will be governed by the statutory and court rules that presently apply to all federal habeas corpus cases." *Id.* (emphasis added).

171. *See id.* The Committee explained that "[t]he final judgment as to the *adequacy* of any system . . . rests ultimately with the federal judiciary . . . . [T]he adequacy of the system—as opposed to the competency of particular counsel—can be settled through litigation." *Id.*

172. *See id.*

173. *See* 28 U.S.C.A. §§ 2261-66; *see also House Report*, *supra* note 15, at 10 (explaining that Title I of the AEDPA adopted a version of the Powell Committee's proposal).

174. *See* 28 U.S.C.A. § 2244(d)(1) (West Supp. 1997); *see also id.* § 2255 (imposing a one-year deadline on federal prisoners for filing motions attacking sentences).

175. *See id.* § 2244(d)(1)(A). Section 2244(d)(1) provides, in pertinent part, that: "The limitation period shall run from . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* Section 2244(d)(1) includes three exceptions whereby the statute of limitations may commence after the conclusion of direct review or the expiration of the time for seeking such review. *See id.* § 2244(d)(1)(B)-(D). The first exception applies in cases where improper state interference prevents the timely filing of an application. *See id.* § 2244(d)(1)(B). Under this exception, the statute of limitations begins to run on "the date on which the impediment to filing an application . . . is removed." *Id.* A second exception applies when a state prisoner benefits from the retroactive application of a new constitutional rule. *See id.* § 2244(d)(1)(C); *see also* Teague v. Lane, 489 U.S. 288, 310, 311, 312-13 (1989) (plurality opinion) (establishing a stringent retroactivity standard applicable to new constitutional rules announced or applied retroactively in federal habeas corpus proceedings); *supra* notes 127-51 and accompanying text (discussing the rule of nonretroactivity). Under

nificant because prior to the Amendment, no statute of limitations existed.[176]

Chapter 154 carves out an exception to the one-year statute of limitations permitting states to invoke a six-month filing deadline.[177] By its terms, this exception applies only to petitions for habeas corpus "brought by prisoners in State custody who are subject to a capital sentence."[178] Furthermore, the exception applies only to prisoners sentenced to death in states that "opt-in" to Chapter 154's procedural scheme by satisfying certain threshold requirements, including the provision of appointed counsel for capital inmates in state post-conviction proceedings.[179] The most significant characteristic of Chapter 154's statutory model is its voluntary nature.[180] States are not required to comply with the "opt-in" provisions.[181]

By providing a default statute of limitations of one year, Congress diluted much of Chapter 154's alluring appeal. The stringent one-year filing deadline applies to all prisoners sentenced to death in "opt-out" states, including those states that decline to furnish any assistance of counsel in post-conviction proceedings.[182] Thus, the one-year default time period undermines any "incentive for a state to opt into a plan that provides *superlative restrictions* of the writ of federal habeas corpus when the alternative is to not opt into the plan and instead have only the merely *very good restrictions* that exist under current law."[183] Conse-

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this exception, the statute of limitations begins to run on "the date on which the constitutional right . . . was initially recognized by the Supreme Court." 28 U.S.C.A. § 2244(d)(1)(C). Finally, when newly discovered evidence provides the factual predicate of a claim, the limitation period commences on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." *Id.* § 2244(d)(1)(D).

176. *See* 28 U.S.C.A. § 2244(b) (1994), *amended by* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (to be codified at 28 U.S.C. § 2244 (d)(1)); *see also Powell Committee Report*, *supra* note 15, at 3240 (explaining that habeas corpus was not subject to a statute of limitations at the time of the Powell Committee's deliberations); Mello & Duffy, *supra* note 60, at 452 (observing that prior to the Act, habeas corpus had not been subject to a statute of limitations).

177. *See* 28 U.S.C.A. § 2263(a) (West Supp. 1997).

178. *Id.* § 2261(a).

179. *See id.* § 2261(a)-(b).

180. *See* Berger, *supra* note 118, at 1678 (explaining that the Powell Committee proposed to create a voluntary mechanism whereby states may acquire procedural benefits in federal habeas corpus proceedings in exchange for "agreeing to a few modest reforms in addition to offering competent counsel in state post-conviction actions").

181. *See Powell Committee Report*, *supra* note 15, at 3240 (stating that under the Committee's proposal, state participation is optional).

182. *See* 28 U.S.C.A. § 2244(d)(1).

183. *ABA Report*, *supra* note 44, at 18 (emphasis added). A key feature that distin-

quently, capital petitioners pursuing post-conviction relief in opt-out states may be subject to the one-year filing deadline, but denied the assistance of counsel.[184] By undermining incentives for states to provide post-conviction counsel, the one-year limit hinders the goal of affording capital petitioners a fair and full course of collateral review.[185]

2. Section 104: Effect of Failure to Exhaust State Remedies

Title I also amends the exhaustion requirement applicable to all federal habeas petitions filed by state prisoners.[186] The Amendment provides that district courts may deny, on the merits, federal habeas corpus petitions containing unexhausted claims, regardless of whether state remedies are available.[187] A petitioner then may appeal the denial, but will not be given the benefit of an evidentiary hearing record to address

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guishes Chapter 154 from the Powell Committee and ABA proposals is an unconditional default time period attendant with the conditional six-month time limit. *See* 28 U.S.C.A. § 2244(d)(1) (providing that one-year period of limitations for "opt-out" states); *see also id.* § 2263(a) (providing a six-month statute of limitations for "opt-in" states). On one hand, the ABA proposal included a one-year statute of limitations applicable to all cases where relief is sought from a state-imposed capital sentence. *See ABA Report, supra* note 44, at 264. Because the ABA proposal required all states to provide competent post-conviction counsel, a six-month procedural carrot to encourage state participation was unnecessary. *See* Berger, *supra* note 118, at 1686 (discussing why the ABA's mandatory approach is better than the Powell Committee's voluntary model). On the other hand, the Powell Committee proposal included a six-month statute of limitations for opt-in states. *See Powell Committee Report, supra* note 15, at 3240. However, under this proposal no statute of limitations applied to states that did not meet the opt-in requirements. *See id.* Thus, unlike the ABA and Powell Committee proposals, Chapter 154 undermines state incentives to provide capital inmates with post-conviction counsel by unconditionally conferring upon states a significant procedural benefit. *See* 28 U.S.C.A. § 2244(d)(1).

184. *See House Report, supra* note 15, at 9-10.

185. *Cf. Powell Committee Report, supra* note 15, at 3240 (noting that *pro se* defendants generally fail to exhaust constitutional claims properly in state court); Mello & Duffy, *supra* note 60, at 458 (explaining that more than 95% of capital inmates are poor and illiterate, yet death penalty cases are the most difficult and complex form of litigation).

186. 28 U.S.C.A. § 2254(b)(2) & (3) (West Supp. 1997). Section 2254(b) provides, in part, that:

> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement ... unless the State, through counsel, expressly waives the requirement.

Id.

187. *See id.* § 2254(b)(2); *see also House Report, supra* note 15, at 9-10. This modification marks a significant departure from the exhaustion principles established in *Rose v. Lundy* that required federal courts simply to dismiss mixed habeas corpus petitions. *See* Rose v. Lundy, 455 U.S. 509, 522 (1982) (plurality opinion).

any factual disputes left unresolved or undeveloped in the state court.[188] Because an appellate court reviewing a denied petition may consider only the state court's disputed factual findings, constitutional claims unaddressed at the state level may never be considered on the merits in federal habeas review.[189]

Under Section 104, "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."[190] The express waiver provision reverses the existing law that required a case-by-case analysis to determine whether addressing unexhausted claims on the merits would serve the administration of justice.[191] Section 104 adds further inequity to the already tilted playing field of capital litigation.[192] While states may not inadvertently waive the exhaustion requirement, capital petitioners are not accorded reciprocal treatment because procedural default rules and other procedural barriers remain intact.[193]

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188. *See* 28 U.S.C.A. § 2254(e)(1) (providing that in any federal habeas corpus proceeding instituted by a state inmate, the factual determinations by a state court are presumed correct absent a contrary showing by clear and convincing evidence).

189. *See* Clarke, *supra* note 23, at 1383 n.235 (noting that "[c]essation of the federal court's ability to develop a factual record in appropriate cases would virtually end modern federal habeas corpus practice").

190. 28 U.S.C.A. § 2254(b)(3).

191. *See House Report*, *supra* note 15, at 10 (noting that the importance of comity underlies the exhaustion requirement). Section 2254(b)(3) impliedly overrules *Granberry v. Greer* where the Court held that when a state belatedly objects to the presentation of unexhausted claims in federal habeas review, district courts may consider the unexhausted claims if it serves the administration of justice. *See* Granberry v. Greer, 481 U.S. 129, 134-35 (1987).

192. *See* Berger, *supra* note 118, at 1694 (criticizing the Committee for strengthening finality without providing a reciprocal reduction in the vice of forfeiture law); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1844-49 (1994) (explaining that allocation of state resources traditionally favors the prosecution and not publicly funded defense organizations); Richard Klein, *The Eleventh Commandment: Thou Shall Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 363 (1993) (observing that "[a]s the number of indigents charged with crimes has increased, in part, due to expanded funding for police and prosecutors to fight the . . . 'war on drugs,' there has not been a corresponding increase of funding to provide counsel for indigent defendants"); *see also* Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis Is Chronic: Balanced Allocation of Resources Is Needed to End the Constitutional Crisis*, CRIM. JUST., Summer 1994, at 12, 13 (reporting that statistics from the Department of Justice indicate that criminal justice expenditures in 1990 at the state and federal levels was $74 billion, of which only 2.3% was spent on public defense).

193. *See House Report*, *supra* note 15, at 11 (explaining that Title I of the Act contains provisions that strengthen finality in an effort to deter delay tactics in capital litigation); *cf.* Berger, *supra* note 118, at 1694 n.186 ("Since the [Powell] Committee's undetailed, unde-

3. Section 106: Limits on Second or Successive Petitions

Section 106 addresses successive habeas corpus petitions[194] in opt-in and opt-out states.[195] Generally, once a federal district court or a circuit court of appeals denies a habeas petition or the statute of limitations for filing a federal habeas petition expires, no federal court may grant a stay of execution or relief in a capital case based on newly discovered evidence unless a petitioner demonstrates that "the facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the [petitioner] guilty of the underlying offense."[196] Under this standard, facts relevant to the capital sentencing proceeding provide no grounds for a stay of execution or relief.[197] The rationales underlying this heightened standard are that ample opportunities exist for petitioners to present sentence-related claims in prior state and federal post-conviction proceedings, and that the value of permitting review of successive sentence-related claims is outweighed by the need to prevent abusive practices.[198]

In addition to imposing a shortened statute of limitations, this provi-

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manding, and unenforceable counsel provisions threaten to continue regimes of finality produced through default, it should have been especially incumbent on the Committee to ease the vice of forfeiture law.").

194. *See* Schlup v. Delo, 513 U.S. 298, 318 n.34 (1995) (defining a "successive petition" as one that "raises grounds identical to those raised and rejected on the merits on a prior petition").

195. *See* 28 U.S.C.A. § 2244(b) (governing treatment of successive habeas corpus petitions); *see also id.* § 2262(c) (prohibiting a federal court from granting a stay of execution unless the petitioner can satisfy the stringent requirements of § 2244(b)).

196. *Id.* § 2244(b)(2)(B)(ii); *see also id.* § 2262(b)-(c) (enumerating conditions under which a stay of execution terminates and may be reinstated only if section 2244(b) is satisfied).

197. *See House Report, supra* note 15, at 16.

198. *See id.* Section 2244(b)(2)(B)(ii) is a hybrid of the standard set forth in *Sawyer v. Whitley* pertaining to claims of "legal innocence" raised under the "miscarriage of justice" exception. *See id.*; Sawyer v. Whitley, 505 U.S. 333, 346-48 (1992) (explaining that claims relevant to the capital sentencing proceeding are not considered under a claim of "legal innocence" because they have no bearing on the determination of guilt or innocence). The Powell Committee shared the view that successive sentence-related claims are properly asserted in initial post-conviction proceedings and not at the eleventh hour. *See Powell Committee Report, supra* note 15, at 3240. The Committee's proposed version of section 244(b)(2)(B)(ii), which was markedly different from what Congress adopted under the AEDPA, required a petitioner to demonstrate that "[t]he facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed." *Id.* at 3243. Unlike Chapter 154, the Committee's proposed version neither required a showing of clear and convincing evidence nor did it incorporate the rational basis standard of review. *See id.*

sion may result in a less apparent, but significant, consequence.[199] By virtually eliminating the possibility for review of successive sentence-related claims, the section threatens to collide with the Eighth Amendment's proscription against cruel and unusual punishment.[200] A capital inmate who becomes insane after the conclusion of federal habeas review could be precluded from pursuing further relief because the insanity would not bear any relation to the validity of the underlying conviction.[201]

4. Section 107: Death Penalty Litigation Procedures (Chapter 154)

Section 107 includes 28 U.S.C.A. § 2263(a) requiring capital prisoners to file federal habeas petitions within 180 days upon filing of a state court order appointing counsel for post-conviction adjudication.[202] The statute of limitations is tolled while a petition for certiorari in the Supreme Court is pending once direct review in state court is concluded, and during state post-conviction proceedings.[203] The statute of limitations is not tolled, however, during pendency of a petition for certiorari in the Supreme Court following the completion of state post-conviction review.[204]

Section 2263(a) strikes at the heart of the habeas corpus doctrine.[205] Under Chapter 154, an indigent is appointed new counsel following trial

199. *See infra* notes 202-14 and accompanying text (discussing the implications of an abbreviated statute of limitations for filing federal habeas corpus petitions).

200. *See* Ford v. Wainwright, 477 U.S. 399, 405-10 (1986) (discussing the historical development of Eighth Amendment's proscription against cruel and unusual punishment).

201. *See* Berger, *supra* note 118, at 1699 (commenting that the Powell Committee failed to address the possibility of relief in the event a prisoner becomes insane).

202. *See* 28 U.S.C.A. § 2263(a) (West Supp. 1997).

203. *See id.* § 2263(b)(1)-(2).

204. *See id.* The Powell Committee's proposed version of Section 2263 is nearly identical. *See Powell Committee Report*, *supra* note 15, at 3244. The purpose of the abbreviated statute of limitations is to motivate prisoners to initiate promptly, and continually pursue post-conviction review. *See id.* Like Chapter 154, the Powell Committee proposal did not toll the statute of limitations to permit the filing of petitions for certiorari in the United States Supreme Court following state post-conviction review. *See id.* The Committee opined that multiple opportunities for Supreme Court review were not essential to fairness in capital cases. *See id.* (noting that since 1972, out of 106 cases, the Court granted certiorari in only two capital cases following state post-conviction review).

205. *See* Fay v. Noia, 372 U.S. 391, 400 (1963) (acknowledging that "there is no higher duty than to maintain [the writ of habeas corpus] unimpaired" (quoting Bowen v. Johnston, 306 U.S. 19, 26 (1939))), *overruled by* Coleman v. Thompson, 501 U.S. 722 (1991); *cf.* United States v. Morgan, 346 U.S. 502, 505 (1954) (holding that federal district courts are authorized to issue writs of *coram nobis* which, like habeas corpus, exist without time limitations); United States v. Smith, 331 U.S. 469, 475 (1947) (explaining that the writ of habeas corpus is a mechanism to cure jurisdictional and constitutional defects unimpaired by temporal constraints).

and direct appeal.[206] Counsel must become familiar with the legal and factual particulars of each case and investigate unresolved issues prior to filing state post-conviction pleadings.[207] Given that the purpose of collateral review is "to allow for a fresh look at the case,"[208] the 180-day limitation undermines this fundamental tenet by forcing post-conviction counsel frantically to prepare state collateral petitions, thereby increasing the risk of attorney error and the likelihood of procedural default.[209]

If counsel spends a majority of the 180 days preparing a state collateral petition, the remaining time then must be divided between preparing a petition for certiorari to the Supreme Court at the close of state post-conviction review and a first federal habeas petition.[210] Under severe time constraints, counsel may face the unenviable choice of simultaneously preparing both petitions or abandoning any possibility of Supreme Court review following state post-conviction adjudication.[211]

Furthermore, section 2263(a) defies one of Chapter 154's fundamental objectives: efficiency.[212] The statute illogically compels the postponement of Supreme Court review following state post-conviction adjudication when meritorious claims can be addressed promptly.[213] Instead, petition-

206. *See* 28 U.S.C.A. § 2261(d).

207. *Compare Powell Committee Report*, *supra* note 15, at 3240 (explaining that "[a]lthough the [six-month] time period may seem short in view of the fact that no time limit whatsoever exists at present, it should be noted . . . that six months is far longer than the time provided for [pursuing] appeals in the state and federal systems, or for seeking certiorari review in the Supreme Court"), *with* Berger, *supra* note 118, at 1696 (maintaining that six months is not sufficient time for counsel to re-investigate factual and legal issues in capital cases), *and* Mello & Duffy, *supra* note 60, at 497 (characterizing a six-month limitation as "completely inadequate" to prepare for capital habeas corpus review).

208. Berger, *supra* note 118, at 1696 (arguing that six months is insufficient time for the necessary investigation and re-evaluation of all factual and legal issues prior to submitting habeas petitions).

209. *See id.* at 1694 (predicting that time limitations will prevent counsel from preserving legitimate claims so as to avoid procedural default).

210. *See* 28 U.S.C.A. § 2263(b)(1)-(2); *see also Powell Committee Report*, *supra* note 15, at 3244 (explaining that the Committee eliminated the tolling of time for filing of certiorari in the Supreme Court following state post-conviction because it believed that fundamental fairness does not require multiple opportunities for Supreme Court review).

211. *See* Berger, *supra* note 118, at 1697 n.200 (positing that the Powell Comittee's true intention was to completely eliminate petitions for certiorari in the Supreme Court following state post-conviction review).

212. *See House Report*, *supra* note 15, at 7 (explaining that Chapter 154 "shall be construed to promote the expeditious conduct and conclusion of State and Federal court review in capital cases"); *Powell Committee Report*, *supra* note 15, at 3241 (contending that fundamental fairness dictates that criminal penalties be imposed swiftly absent meritorious claims of constitutional error).

213. *See* Berger, *supra* note 118, at 1697 (insisting that refusing to toll the statute of limitations during the pendency of a petition for certiorari in the Supreme Court following

ers are encouraged to delay seeking certiorari in the Supreme Court until the conclusion of federal habeas proceedings, thereby depleting the resources of the lower federal courts.[214]

Section 107 also includes 28 U.S.C.A. § 2264 governing the scope of habeas corpus review in an opt-in scenario.[215] Under this section, federal district courts must decide only claims previously raised and decided on the merits in state courts.[216] Furthermore, petitioners are prohibited from returning to state court to exhaust outstanding remedies.[217] Only unexhausted claims falling within one of the narrow exceptions to section 2264(a) can be considered by district courts.[218] Federal courts must treat a second presentation of a previously unexhausted claim as an "abuse of the writ"[219] and dismiss it.[220] Thus, section 2264 effectively transforms the exhaustion requirement into a procedural default bar eliminating any possibility that a federal court would decide unexhausted claims on the

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state post-conviction review ignores numerous instances "in which the Court has summarily vacated and remanded at this stage"). The severe burdens imposed by the tolling requirements suggest that Congress intended to eliminate the filing of petitions for certiorari to the Supreme Court following state post-conviction review. *See id.* at 1697 n.200.

214. *See id.* at 1697 n.201 (arguing that Supreme Court preserves the resources of the federal judiciary when it remands cases back to state courts following state post-conviction review).

215. *See* 28 U.S.C.A. § 2264. Section 2264 requires that federal district courts only consider claims previously raised and decided on the merits in state courts when adjudicating habeas corpus petitions filed by state death-row inmates. *See id.* § 2264(a).

216. *See id.* § 2264(a) (providing that "the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts"); *see also Powell Committee Report, supra* note 15, at 3245 ("The prisoner cannot return to state court to exhaust even if he would like to do so."). Section 2264 does not apply when the failure to present a claim is the result of improper state action, subsequent recognition and retroactive application of a new federal right, or discovery of a novel factual predicate not previously known despite the exercise of reasonable diligence. *See* 28 U.S.C.A. § 2264(a)(1)-(3). The Powell Committee's proposed version of section 2264 is very similar to what Congress adopted under the AEDPA. *See Powell Committee Report, supra* note 15, at 3245. The Committee justified this notable departure from the exhaustion principles announced in *Rose v. Lundy*, explaining that state procedural default rules often preclude exhaustion anyway. *See id.*; *see also* Rose v. Lundy, 455 U.S. 509, 522 (1982) (plurality opinion) (instructing federal district courts to dismiss habeas petitions containing unexhausted and exhausted claims). The Committee presumed that states likely would prefer prompt adjudication of capital cases despite the minimal infringement of their interests in comity. *See Powell Committee Report, supra* note 15, at 3245.

217. *See Powell Committee Report, supra* note 15, at 3245.

218. *See* 28 U.S.C.A. § 2264(a)(1)-(3).

219. *See* Schlup v. Delo, 513 U.S. 298, 318 n.34 (1995) (defining "an abuse of the writ" as a petition which raises claims "that were available but not relied upon in a prior petition"); McKleskey v. Zant, 499 U.S. 467, 489 (1991) (confirming that "abuse of the writ" is not limited to instances of deliberate abandonment of constitutional claims in earlier review proceedings).

220. *See* 28 U.S.C.A. § 2244(b)(1).

merits.[221]

Finally, section 107 contains 28 U.S.C.A. § 2266 that imposes on federal district and appellate courts time limits for completing capital habeas corpus litigation.[222] Habeas corpus petitions receive priority over all non-capital matters in federal courts.[223] District courts must conclude review of a habeas petition within 180 days after an application is filed,[224] and federal appellate courts must conclude review of capital petitions within 120 days after the date on which a reply brief is filed.[225] A court's failure to comply with these time constraints does not entitle a petitioner to a stay of execution or relief from a conviction or sentence.[226]

The statute contravenes the Powell Committee's philosophy that "[j]ustice may be ill-served by conducting judicial proceedings in capital cases under the pressure of an impending execution."[227] The statutory time limitations may prevent federal courts from according careful and thorough evaluation to constitutional claims and may result in rushed judgments, an event which the Committee sought to avoid in capital col-

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221. *See id.* Under section 2264(a), a federal district court is forbidden to consider a claim in a habeas corpus proceeding that was not raised and decided on the merits in the state courts, unless the petitioner can show that his failure to assert the claim in state court, that is, failure to "exhaust" state court remedies, falls under one of three narrow exceptions. *See id.* § 2264(a); *see also id.* § 2264(a)(1)-(3) (providing three exceptions that excuse failure to exhaust state court remedies). Furthermore, section 2264(b) provides that after reviewing the claims presented, "the court *shall* rule on the claims properly before it." *Id.* § 2264(b) (emphasis added). In other words, a federal district court is not authorized either to allow the petitioner to return to state court to complete exhaustion or to consider unexhausted claims on their merits. *See id.* § 2264 (a)-(b). Moreover, a petitioner is barred from raising the claims in a later federal habeas proceeding because a second presentation of the claims would constitute an abuse of the writ. *See id.* § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application . . . that was presented in a prior application *shall be dismissed.*" (emphasis added)); *see also Schlup*, 513 U.S. at 318 n.34 (defining an "abuse of the writ" as a petition which raises claims "that were available but not relied upon in a prior petition"). Thus, under Section 2264, failure to exhaust state court remedies is tantamount to an absolute surrender of any further right to assert unexhausted claims in federal habeas corpus proceedings. *See* 28 U.S.C.A. 2244 (b)(1); *cf.* Berger, *supra* note 118, at 1698-99 (noting that under the Powell Committee's proposed provisions governing successive petitions, a federal court could not grant the writ even to prevent fundamental unfairness).

222. *See* 28 U.S.C.A. § 2266.

223. *See id.* § 2266(a).

224. *See id.* § 2266(b)(1)(A).

225. *See id.* § 2266(c)(1)(A). Section 2266 permits a one-time extension of 30 days in federal district courts, but only upon a written finding of good cause that the interests of justice outweigh the public interest in a prompt resolution. *See id.* § 2266(b)(1)(C)(i).

226. *See id.* § 2266(b)(3)(A) & (c)(3).

227. *Powell Committee Report*, *supra* note 15, at 3240.

lateral proceedings.[228]

C. The Judicial Perspective: Interpreting Chapter 154

To date, no state system for the appointment of post-conviction counsel in capital cases has satisfied Chapter 154's opt-in requirements.[229] Nonetheless, judicial opinions evaluating the inadequacy of these state appointment systems are instructive.[230] First, although these opinions provide little direct guidance in defining the operative standards that are necessary to satisfy Chapter 154's "capable and committed" mandate, these opinions do identify specific reasons why certain state mechanisms are deficient.[231] Second, these cases support the general proposition that Chapter 154's quid pro quo design and plain language mandate strict enforcement of its threshold requirements.[232]

Several judicial opinions devote careful attention to the standards of

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228. *See id.* The Powell Committee emphasized the need for careful and deliberate judicial review in capital cases. *See id.* The rigid time limitations imposed on the federal courts illustrate Chapter 154's marked departure from the Powell Committee's underlying rationale. *See* 28 U.S.C.A. § 2266; *see also Powell Committee Report*, *supra* note 15, at 3243 (emphasizing that the proposed time limitations were "designed to stimulate the orderly and expeditious consideration on the merits of all federal issues arising in capital cases"). Unlike section 2266, the Powell Committee's proposal was consistent with the rationale that litigation constricted by time limitations is detrimental to "a rational system of justice." *Id.* at 3240.

229. *See supra* note 19 (citing cases that held various states not to have satisfied the requirements of Chapter 154).

230. *See infra* notes 234-52 and accompanying text (discussing significant aspects of judicial opinions exempting various states from Chapter 154's procedural benefits).

231. *See, e.g.*, Williams v. Cain, 942 F. Supp. 1088, 1092 (W.D. La. 1996) (holding that Chapter 154's accelerated procedures do not apply because the State of Louisiana had not established standards to assure the competency of appointed post-conviction counsel at the time the petitioner's conviction became final), *aff'd in part, rev'd in part*, 125 F.3d 269 (5th Cir. 1997); Hill v. Butterworth, 941 F. Supp. 1129, 1147 (N.D. Fla. 1996) (holding that the State of Florida had not triggered Chapter 154's procedural scheme because capital prisoners seeking post-conviction relief were denied the immediate appointment of counsel); Zuern v. Tate, 938 F. Supp. 468, 471 (S.D. Ohio 1996) (holding that the State of Ohio did not satisfy the precondition of Chapter 154 requiring the provision of attorney compensation and reasonable litigation expenses); Ashmus v. Calderon, 935 F. Supp. 1048, 1074-75 (N.D. Cal. 1996) (concluding that the State of California had not met the threshold requirements of Chapter 154, in part, because it had not established standards of competency for post-conviction counsel), *aff'd*, 123 F.3d 1199 (9th Cir. 1997), *cert. granted in part*, 118 S. Ct. 596 (1997); Cockrum v. Johnson, 934 F. Supp. 1417, 1423 (E.D. Tex. 1996) (explaining that Chapter 154 is inapplicable because the State of Texas had not established a mechanism for the appointment and payment of post-conviction counsel at the time the petitioner's conviction became final), *rev'd on other grounds*, 119 F.3d 297 (5th Cir. 1997).

232. *See Zuern*, 938 F. Supp. at 472 (commenting that Chapter 154 was not drafted in terms of substantial compliance, but rather, strict compliance).

competency and the appointment of post-conviction counsel.[233] For example, in *Ashmus v. Calderon*[234] the court held that California's scheme for appointing counsel in state post-conviction proceedings did not fulfill Chapter 154's requirements.[235] First, the *Ashmus* court noted that California's standards for competent counsel, which were promulgated by an advisory Judicial Council, were not rules of a court of last resort, as required by Chapter 154.[236] Second, the court found that California's standards were not binding on state courts.[237] The *Ashmus* court opined that although the Act did not expressly charge that competency standards be "inexorably mandatory," the requirement that states promulgate such standards for appointed counsel is meaningless if implementation and enforcement are discretionary.[238] Finally, the court observed that California's standards did not require that attorneys possess a minimum level of experience in capital habeas corpus proceedings.[239]

In another case, *Hill v. Butterworth*,[240] the court determined that the State of Florida had not satisfied Chapter 154's threshold requirements.[241] The court first noted that Florida's standards of competency did not require that appointed attorneys possess any degree of expertise and skill in handling state post-conviction litigation.[242] Rather, Florida law required only that appointed counsel "must have been a member of the Florida Bar for at least five years."[243] The court held that such nominal eligibility provisions did not comport with the plain language of Chapter 154 that specifically envisions the appointment of "counsel who are competent through capital, post-conviction experience."[244]

The *Hill* court also held that Florida did not provide capital prisoners

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233. *See infra* notes 234-46 and accompanying text (discussing standards of competency that did not satisfy Chapter 154's threshold requirement).

234. 935 F. Supp. 1048 (N.D. Cal. 1996), *aff'd*, 123 F.3d 1199 (9th Cir. 1997), *cert. granted in part*, 118 S. Ct. 596 (1997).

235. *See id.* at 1072 (listing three reasons why California's system failed to satisfy the federal requirements).

236. *See id.* at 1072-73.

237. *See id.* at 1073-74.

238. *See id.* at 1073.

239. *See id.* at 1074.

240. 941 F. Supp. 1129 (N.D. Fla. 1996).

241. *See id.* at 1143-44, 1147.

242. *See id.* at 1142-43.

243. *Id.* at 1142. Additionally, the *Hill* court noted that Florida law required that full-time assistant post-conviction counsel must only "be members in good standing of the Florida Bar with not less than 2 years experience in the practice of criminal law." *Id.* (citation omitted).

244. *Id.*

with a meaningful offer of counsel because there was a considerable backlog of unassigned capital inmates seeking post-conviction review.[245] The court explained that the applicability of Chapter 154's abbreviated statute of limitations is contingent upon the understanding that every eligible capital defendant who accepts the state's statutory offer must be appointed counsel immediately.[246]

Additionally, other cases involving the applicability of Chapter 154 focused on attorney compensation and the payment of reasonable litigation expenses in state post-conviction proceedings.[247] In holding that the State of Ohio had not satisfied Chapter 154's requirements, *Zuern v. Tate*[248] noted that compensatory caps in most Ohio counties precluded the payment of adequate compensation to appointed counsel and reasonable litigation expenses in state post-conviction proceedings.[249] Similarly, in *Booth v. Maryland*,[250] the court noted that compensating privately appointed post-conviction counsel at rates well below the minimum levels necessary to pay overhead expenses was unreasonable.[251] Thus, when read together, *Zuern* and *Booth* stand for the proposition that Chapter 154 contemplates that attorney compensation and reasonable litigation expenses must, at a minimum, be sufficient to acquire the assistance of competent post-conviction counsel.[252]

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245. *See id.* at 1146. The *Hill* court explained that the lack of adequate standards of competency for appointed post-conviction counsel was sufficient, by itself, to hold that the State of Florida had not opted-in to Chapter 154's procedural scheme. *See id.* at 1144 n.25. In anticipation of subsequent judicial review, the *Hill* court addressed the remaining issues notwithstanding this preliminary determination. *See id.*

246. *See id.* at 1146-47. The *Hill* court concluded that the backlog of unassigned capital prisoners indicated that Florida did not provide a meaningful offer of counsel as Chapter 154 requires. *See id.* at 1147; *see also* Zuern v. Tate, 938 F. Supp. 468, 471 (S.D. Ohio 1996) (explaining that the State of Ohio did not confer upon capital prisoners a meaningful offer of counsel).

247. *See* Booth v. Maryland, 940 F. Supp. 849, 854 (D. Md. 1996) (finding that the State of Maryland did not adequately compensate appointed post-conviction counsel), *vacated on other grounds*, 112 F.3d 139 (4th Cir. 1997), *petition for cert. filed*, (U.S. Aug. 14, 1997) (No. 97-5623); *Zuern*, 938 F. Supp. at 471 (explaining that the State of Ohio's extremely low compensatory caps prevented the payment of adequate compensation for appointed counsel); *see also* 28 U.S.C.A. § 2261(b) (West Supp. 1997) (requiring states to establish a system to compensate counsel and pay reasonable litigation expenses in representing indigent death-row inmates in state post-conviction proceedings).

248. 938 F. Supp. 468 (S.D. Ohio 1996).

249. *See id.* at 471.

250. 940 F. Supp. 849, 854 (D. Md. 1996) (finding that the State of Maryland did not adequately compensate appointed post-conviction counsel), *vacated on other grounds*, 112 F.3d 139 (4th Cir. 1997), *petition for cert. filed*, (U.S. Aug. 14, 1997) (No. 97-5623).

251. *See id.*

252. *See id.* at 854 n.6; *cf. ABA Report*, *supra* note 44, at 22 ("Reasonable compensa-

IV. PROPOSED GUIDELINES FOR OPT-IN STATES

A. Primary Considerations

Chapter 154 is essentially a quid pro quo.[253] The end result is the only material consideration: a mechanism either provides capable and committed counsel in state post-conviction proceedings or it does not.[254] Judicial inquiry must look behind perfunctory statutory language in evaluating opt-in compliance.[255] In theory, a state system could comply with Chapter 154's "capable and committed" mandate on its face, but not achieve the same in practice.[256] Fairness and efficiency depend on strict adherence to the quid pro quo arrangement.[257]

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tion means something other than 'token' compensation.").

253. *Cf.* Berger, *supra* note 118, at 1679 (maintaining that quid pro quo is the administrative centerpiece of the Powell Committee's proposal).

254. *See Zuern*, 938 F. Supp. at 472 ("Congress did not write § 2261 in terms of substantial compliance. Rather, the section is replete with mandatory language.").

255. *See* Hill v. Butterworth, 941 F. Supp. 1129, 1142 (N.D. Fla. 1996) (holding that merely requiring assistant post-conviction counsel to be members in good standing of the Florida Bar, with no fewer than two years experience, did not fulfill the requirements of Chapter 154); *Booth*, 940 F. Supp. at 853-54 (noting that regulations governing the appointment of capital post-conviction counsel promulgated by the Public Defender never were applied); Austin v. Bell, 927 F. Supp. 1058, 1062 (M.D. Tenn. 1996) (holding that merely requiring appointed counsel to be licensed to practice law in Tennessee did not ensure that counsel was competent to handle death penalty habeas litigation).

256. *See* Berger, *supra* note 118, at 1690 (regarding as unrealistic the assumption that states with historically deplorable track records in providing indigent capital defendants with adequate representation will move swiftly to institute measures that accord capital petitioners competent counsel).

257. *See Austin*, 927 F. Supp. at 1062 (rationalizing that because Chapter 154 eliminates claims of ineffective assistance of counsel as a ground for relief in state or federal collateral review, ensuring the appointment of qualified counsel in post-conviction proceedings is paramount). In *Satcher v. Netherland*, the court emphasized the importance of strictly enforcing the triggering provisions of Chapter 154, stating that:

> If any one of the safeguards of Section 2261 is not met, but the state is nonetheless provided with the "benefits" of opt-in status anyway, prisoners will be subjected to less than full and fair state habeas review and then truncated federal court review without having the guarantees thought by Congress to warrant the truncated review. This was not Congress' intent under the Act.

944 F. Supp. 1222, 1245 (E.D. Va. 1996) (emphasis omitted), *aff'd in part, rev'd in part*, Satcher v. Pruett, 126 F.3d 561 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 595 (1997).

In eliminating claims of ineffective assistance of counsel in state and federal collateral review proceedings, the Powell Committee opined that the primary focus of federal habeas corpus should be confined to evaluating the performance of trial and appellate counsel. *See Powell Committee Report, supra* note 15, at 3242. The Committee's view is consistent with the Court's reasoning in *Wainwright v. Sykes* which characterized the criminal trial as the "main event" for resolving questions of guilt or innocence and warned that a federal habeas corpus proceeding was not the proper forum to re-litigate state trials. *See* 433 U.S. 72, 90-91 (1977). However, neither the Committee nor the Congress addressed

Chapter 154 requires something that many states stubbornly have refused to embrace in the context of institutionalized public legal defense: commitment.[258] Specifically, the proper implementation of Chapter 154 would require the substantial commitment of public resources;[259] the commitment of political will working in tandem with, rather than in opposition to, affirmative, good-faith efforts to provide capital prisoners with meaningful post-conviction representation;[260] the commitment of lawyers who would recognize and correct systemic deficiencies;[261] and the commitment of judges and judicial administrators who would faithfully enforce Chapter 154's opt-in requirements.[262] Above all, the proper implementation of Chapter 154 would require that the public and the legal profession work together toward preserving the continued vitality of fundamental fairness in capital litigation.[263]

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the most successfully litigated claim in federal habeas corpus review: the ineffective assistance of counsel at trial. *See House Report*, *supra* note 15, at 36 (dissenting views). Dissenting House members argued that Title I of the AEDPA "ignores the fact that 'main events' flawed by shoddy counsel not only wreak injustice upon defendants, but will continue to generate grounds upon which review will be sought, judgments set aside, and justice delayed." *Id.* at 37.

258. *Cf.* Bright, *supra* note 192, at 1879 (arguing that the spirit of commitment that forcefully advocated social change during the 1960s must be revived to correct the pervasive deficiencies that infect the administration of capital punishment).

259. *Cf. Hill*, 941 F. Supp. at 1145-46 (notwithstanding recent improvements in Florida's indigent defense system, the remaining backlog of unassigned indigent defendants seeking post-conviction relief precluded the State of Florida from opting-in to Chapter 154); *see also* Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (holding that fundamental fairness dictates the provision of certain elemental tools of representation particularly in capital cases); Makemson v. Martin County, 491 So. 2d 1109, 1112-13 (Fla. 1986) (holding unconstitutional a $14 per hour fee cap as applied to court-appointed counsel in a capital case); Bright, *supra* note 192, at 1856 (reporting that Georgia trial judges often refuse to compensate lawyers who successfully obtain new trials for death-penalty clients).

260. *Cf.* Bright, *supra* note 192, at 1878 (arguing that history paints a grim portrait with respect to the moral commitment demonstrated by legislators who traditionally have been reluctant to provide adequate counsel in capital cases).

261. *Cf. id.* at 1878-79 (arguing that lawyers are obligated to correct defects in the legal system); State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984) (en banc) (maintaining that attorneys assigned under a bid system for obtaining indigent defense counsel "are in a position to know when a contract will result in inadequate representation").

262. *Cf. In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Cir. Pub. Defender, 561 So. 2d 1130, 1139 (Fla. 1990) (warning the Florida legislature that if sufficient funds were not allocated to ameliorate the public defense crisis, the court may, upon motion, order the immediate release of indigent convicted felons); State v. Peart, 621 So. 2d 780, 791 (La. 1993) (holding that absent swift legislative action remedying workloads of indigent defense counsel, certain state courts must impose a rebuttable presumption that indigents are not receiving the effective assistance of counsel).

263. *See generally* McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting) (insisting that "the way in which we choose those who will die reveals the depth of moral commitment among the living").

B. State Regulation and Supervision of Chapter 154 Compliance

Chapter 154 provides expedited collateral review procedures for states that satisfy the opt-in requirements.[264] Yet Chapter 154 does not provide a means of monitoring continued opt-in compliance.[265] Although the federal judiciary is responsible for evaluating Chapter 154's applicability, states should implement regulatory measures and supervisory organizations charged with monitoring and evaluating appointment mechanisms in attempting to ensure continued opt-in compliance.[266]

Chapter 154 encourages states to regulate and supervise opt-in compliance for several reasons.[267] First, a mechanism for providing capable and committed representation will be affected by a host of changing socio-economic and political forces.[268] Merely because a state is opt-in today does not mean it is permanently opt-in.[269] Good-faith state supervision of

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264. *See* 28 U.S.C.A. §§ 2261-66 (West Supp. 1997).

265. In *Booth v. Maryland*, the court commented on the absence of any guidelines for monitoring state compliance with Chapter 154's threshold requirements, stating that:

> Chapter 154 hardly prescribes a detailed remedial scheme for the determination of whether a State is entitled to the Chapter's benefits. The Chapter is silent as to the procedural mechanism by which the adequacy of a State's post-conviction processes may be challenged in court. . . . [I]t seems rather clear that it was contemplated that the question of a State's compliance with Chapter 154's requirements would be decided in a proceeding independent of an individual habeas claim.

940 F. Supp. 849, 851 (D. Md. 1996) (citation omitted) (quotation marks omitted), *vacated on other grounds*, 112 F.3d 139 (4th Cir. 1997), *petition for cert. filed*, (U.S. Aug. 14, 1997) (No. 97-5623); *see also Powell Committee Report*, *supra* note 15, at 3242 (remarking that disputes regarding the adequacy of a state's appointment mechanism may be resolved through litigation). *But cf.* Berger, *supra* note 118, at 1690 n.166 (observing that the Powell Committee did not address whether a subsequent opt-out determination may be applied retroactively).

266. *See ABA Report*, *supra* note 44, at 26 (recommending that death penalty states establish and fund organizations devoted to developing and monitoring attorney involvement in all stages of capital litigation).

267. *See infra* notes 268-81 and accompanying text (discussing reasons that support state efforts to supervise "opt-in" compliance).

268. *See* Arnold v. Kemp, 813 S.W.2d 770, 776 (Ark. 1991) (finding unconstitutional a legislative limitation on the fees paid court-appointed counsel in light of the complexity of criminal litigation); *see also* BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP'T OF JUSTICE, CRIMINAL DEFENSE FOR THE POOR, 1986, at 5, 6 (1988) (reporting that in eight jurisdictions from 1982 to 1986, the number of cases involving indigent defendants either doubled or nearly doubled); Klein, *supra* note 192, at 376 (noting that in 1983, the District of Columbia's hourly rate of $30 for court-appointed counsel had not been increased since 1970, even though the consumer price index had risen 140%); Mack Reed, *An Even Longer Wait on Death Row*, L.A. TIMES, Apr. 3, 1996, at 1 (reporting that California's death-row population exceeds the number of available attorneys).

269. *See* 28 U.S.C.A. § 2261(a). Under section 2261, states may benefit from accelerated federal habeas corpus procedures provided that they establish "a mechanism for the

appointment mechanisms could detect and remedy systemic inadequacies caused by constantly fluctuating external forces.[270] By making periodic adjustments, states could preserve the efficacy of appointment systems in rendering capable and committed representation.[271]

Second, the establishment of state regulatory mechanisms capable of addressing problems in appointment systems also could help to avoid needless and repetitive litigation.[272] To challenge a state's opt-in status in federal court, a state prisoner first must satisfy the threshold standing requirement,[273] which includes a required threshold showing of a "threat of immediate and irreparable harm."[274] Rather than postponing an opt-in

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appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings." *Id.* § 2261(b). Additionally, states also "must offer counsel to all State prisoners under capital sentence." *Id.* § 2261(c). By its terms, section 2261(a) conditions the availability of expedited federal habeas corpus procedures on the maintenance of a qualified state mechanism. *See id.* § 2261(a) ("This Chapter . . . shall apply *only if* the provisions of subsections (b) and (c) are satisfied." (emphasis added)).

270. *See supra* note 268 (citing sources illustrating the ever-changing landscape of indigent defense litigation).

271. *Cf. supra* note 262 (citing cases in which state courts employed drastic remedies to ensure that state legislatures provided adequate funds for the provision of counsel for indigent criminal defendants).

272. *See Powell Committee Report*, *supra* note 15, at 3242 (stating that disputes as to the adequacy of appointment systems may be resolved through litigation).

273. *See* Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (explaining that "the standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf" (quotations marks and emphasis omitted)). The standing doctrine derives from the powers conferred upon the judiciary under Article III of the Constitution. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992). By its terms, Article III limits the jurisdiction of federal courts to "Cases" and "Controversies." *See* U.S. CONST. art. III, § 2, cl. 1; *see also Lujan*, 504 U.S. at 560 ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."). Courts employ the standing doctrine to identify disputes that constitute cases or controversies by requiring a plaintiff to establish a "personal stake in the outcome" of the proceeding. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983). In other words, "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth*, 422 U.S. at 498. Supreme Court jurisprudence has established three constitutional elements of standing. *See Lujan*, 504 U.S. at 560-61. A plaintiff bears the burden of establishing all three elements. *See id.* at 561. The first element requires that a plaintiff demonstrate an "injury in fact." *See id.* at 560. "Injury in fact" is defined as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not merely conjectural or hypothetical." *Id.* (quotation marks and citations omitted). Under the second element, a plaintiff must establish a causal connection between the harm and the disputed conduct. *See id.* Finally, a plaintiff bears the burden of showing that the injury likely will be remedied by a favorable judgment. *See id.* at 561.

274. *See* Hoepfl v. Barlow, 906 F. Supp. 317, 320 n.9 (E.D. Va. 1995) (observing that demonstrating a threat of immediate and irreparable injury is a precondition to injunctive

evaluation until a capital petitioner is exposed to the uncertain applicability of Chapter 154, state regulation could avoid these hurdles by providing a thorough analysis of systemic deficiencies as they arise. By remedying problems at an early juncture, states may reduce the need to engage in protracted litigation adversely affecting the interests of capital petitioners, federal courts, and state prosecutors.[275]

Additionally, Chapter 154's virtual elimination of claims of ineffective

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relief). The "immediate and irreparable injury" is a sub-element of the standing doctrine that must be met to invoke the court's injunctive powers. *See* Schroedel v. New York Univ. Med. Ctr., 885 F. Supp. 594, 598 (S.D.N.Y. 1995). It is not enough for a plaintiff to show that the defendant's conduct previously caused harm, but rather, the requirement demands "a showing of a real or immediate threat that the plaintiff will be wronged again." *Id.*

275. *See* Klein, *supra* note 192, at 370 (discussing two major systems for appointing private counsel to represent indigent defendants). The first type of system for the appointment of private counsel is a coordinated assigned counsel system (CACS). *See id.* A CACS is run by a full or part-time administrator who assigns counsel, approves and controls payments and fees, and when necessary investigative services and legal training programs. *See id.* The CACS administrator also is responsible for promulgating standards of competency which attorneys must satisfy in order to be placed on a list of counsel qualified for court appointments. *See id.*

The second type is a judicially managed ad hoc assigned-counsel system. *See id.* Under this system, private attorneys volunteer for court appointments. *See id.* The court maintains a list of available private attorneys and assigns counsel on a rotational basis. *See id.* Compensation of private court-appointed lawyers generally is based on an hourly scale that varies considerably from state to state. *See id.* at 371. Because trial judges generally are the final authority in authorizing attorney payments under both systems, the necessary independence of counsel often is compromised. *See id.* at 370. Defense lawyers are placed in a precarious position when the amount of compensation awarded them is contingent upon judicial satisfaction of counsels' representation. *See* State v. Ryan, 444 N.W.2d 656, 661 (Neb. 1989) (criticizing the trial judge in a capital case for awarding counsel only 20% of the requested remuneration).

A more effective and efficient model is the Post-Conviction Defender Organizations (PCDO). *See* Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 904 (1996) (discussing the utility and economy of PCDOs, and the potential effects of their elimination). PCDOs employ full-time, salaried attorneys who focus only on death penalty cases and related post-conviction matters. *See id.* PCDOs also provide investigative services, support and technical assistance, and legal training that is pertinent to the provision of effective representation in capital cases. *See id.*

The PCDO model is better suited to provide the capable and committed advocacy that Chapter 154 requires. *See id.* First, the fact that PCDO attorneys are salaried and not paid an hourly wage alleviates any tension that may exist when compensation is inexorably linked to judicial approval of counsels' performance. *See id.* Second, unlike attorneys in private practice whose work includes legal matters other than post-conviction litigation, PCDO attorneys devote all of their time to litigating death penalty cases. *See id.* Given the complexity of post-conviction litigation, its rapid rate of change, and the severe consequences that can result from ineffective assistance of counsel in an opt-in scenario, the PCDO model offers the best means to deliver the caliber of capable and committed representation contemplated under Chapter 154. *See id.*

assistance of counsel as a ground for relief in state and federal post-conviction proceedings also increases the need for state supervision.[276] The discovery of ineffective representation after collateral review has commenced will be inconsequential if counsel already has committed irrevocable procedural error.[277] Therefore, states continually must supervise and review the eligibility of counsel to represent capital prisoners.[278]

States have a strong incentive to invest energy and expertise into devising appointment mechanisms.[279] State regulatory organizations should be created to implement and enforce mandatory rules and regulations, provide additional periodic and emergency funding, and monitor individual attorney development and performance.[280] Moreover, such organizations should be comprised of defense attorneys, prosecutors, and judges, actively involved in capital post-conviction litigation, who possess the necessary skill and expertise to develop such appointment systems.[281]

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276. *See* 28 U.S.C.A. § 2261(e) (West Supp. 1997); *see also* Hill v. Butterworth, 941 F. Supp. 1129, 1142 (N.D. Fla. 1996) (noting that only qualified counsel may be appointed to represent capital petitioners in light of Section 2261(e)'s bar on claims of ineffective assistance of counsel).

277. *See* 28 U.S.C.A. § 2261(e) (eliminating claims of ineffective assistance of counsel in state or federal post-conviction proceedings as a ground for relief).

278. *See* Berger, *supra* note 118, at 1690 (criticizing the Committee's proposal to delegate to the states the duty of promulgating standards of attorney competency); *cf.* Bright, *supra* note 192, at 1852 (noting that the lack of job opportunities in indigent defense has encouraged young criminal lawyers to pursue more lucrative practice areas). Central to satisfying Chapter 154's capable and committed mandate is the issue of managerial control. *See id.* at 1870. Only persons with a vested interest in guaranteeing that qualified and willing attorneys are appointed under the quid pro quo arrangement should be conferred such managerial authority. *See id.* Judges and legislators are not equipped to serve this function. *See id.* In most death penalty states, trial and appellate judges are elected. *See id.* at 1857. Because capital murder cases often evoke public outrage and indignation, elected trial judges, whose tenure depends upon the favorable perceptions of the constituency, occasionally appoint inexperienced and unskilled attorneys to defend capital cases. *See id.* at 1856-58. To permit popularly elected judges or legislators impaired by conflicts of interest to regulate such appointment mechanisms provides inadequate assurance that only qualified attorneys are selected to represent capital petitioners. *See id.* at 1870.

279. *See supra* notes 267-81 and accompanying text (discussing reasons supporting state efforts to monitor and supervise "opt-in" compliance).

280. *Cf.* Ira D. Einsohn, Comment, *Judicial Efficiency and Post-Conviction Relief: A Proposal for Texas*, 24 S.W. L.J. 661, 676 (1970) (proposing the adoption of a state commission charged to appoint counsel to assist inmates in the filing of what counsel believes are valid claims for post-conviction relief); *see also* Appendix *infra*, §§ 100 *et. seq.* (suggesting a model statute for the creation of a governing body to assist states in complying with Chapter 154).

281. *Cf.* State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984) (en banc) (observing that a supervisory board not actively involved in defending indigents is not always able to know whether adequate representation is provided). In *Smith*, the Supreme Court of Arizona considered the constitutionality of a low-bid system for awarding contracts to indigent de-

C. Standards of Competency for Appointed Counsel

When promulgating competency standards for appointed counsel, several important considerations must be addressed.[282] First, due to Chapter 154's harsh treatment of successive petitions, exhaustion compliance, and time limitations, competency standards must require that appointed counsel possess a sophisticated, minimum-degree of experience in handling capital post-conviction cases.[283] Attorneys who possess experience in litigating non-capital criminal trials and appeals do not necessarily possess a Chapter 154-degree of experience in handling complex capital litigation and are not necessarily qualified.[284]

Second, appointment mechanisms must regulate attorney caseloads and should consider: (1) the time an attorney is expected to spend representing assigned cases;[285] (2) the competency and experience of each attorney in relation to the number of cases assigned;[286] (3) the complexity

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fense counsel. *See id.* at 1378-82. The court determined that the low-bid system was inadequate, noting that trial counsel's ineffective performance derived partly from his "shocking, staggering and unworkable caseload." *Id.* at 1378-79 (internal quotation marks omitted). Although the court suggested general guidelines in regulating attorney workloads, it emphasized that "[t]he attorneys involved [in defending indigents] . . . are in a position to know when a contract will result in inadequate representation of counsel." *Id.* at 1381; *see also* Bright, *supra* note 192, at 1870 (attributing the inadequate representation of indigents in capital cases to the lack of political leadership and commitment).

282. *See supra* notes 229-52 and accompanying text (reviewing pertinent judicial considerations concerning the appointment of competent post-conviction counsel).

283. *See* 28 U.S.C.A. § 2261(b) (West Supp. 1997) (requiring states to establish mechanisms to provide for competent counsel in state post-conviction proceedings).

284. *See* Ashmus v. Calderon, 935 F. Supp. 1048, 1074 (N.D. Cal. 1996), *aff'd*, 123 F.3d 1199 (9th Cir. 1997), *cert. granted in part*, 118 S. Ct. 596 (1997); Austin v. Bell, 927 F. Supp. 1058, 1061-62 (M.D. Tenn. 1996) (concluding that simply because counsel is a member of the state bar does not mean that counsel is competent to handle post-conviction litigation in death penalty cases).

285. *See Smith*, 681 P.2d at 1382 (asserting that the time constraints resulting from oppressive caseloads may compromise an attorney's professional responsibility); *see also* Caroline A. Pilch, Recent Decision, State v. Smith: *Placing a Limit on Lawyers' Caseloads*, 27 ARIZ. L. REV. 759, 764 (1985) (noting that the *Smith* court invalidated a low-bid contract appointment system as a violation of the Fifth Amendment right to due process and the Sixth Amendment right to counsel on account of excessive caseload burdens).

286. *See Smith*, 681 P.2d at 1381 (finding that a certain Arizona appointment system violated the Constitution partly due to its failure to account for the competency of appointed attorneys); *see also* State v. Peart, 621 So. 2d 780, 789 (La. 1993) (claiming that reasonably effective assistance of counsel intimates that a lawyer not only possesses requisite skill and knowledge, but also sufficient time and resources to properly defend each client); State *ex rel.* Partain v. Oakley, 227 S.E.2d 314, 322 (W. Va. 1976) (acknowledging that attorneys with little or no litigation experience and subject to mandatory court appointments will require additional time to familiarize themselves with the procedural and substantive complexities of criminal law); *see also* Pilch, *supra* note 285, at 763 n.34 (noting that the National Legal Aid and Defender Association Guidelines for Negotiating and Awarding Indigent Defense Contracts requires the consideration of professional ability,

of each case; and (4) the availability of support staff.[287]

Third, it is imperative that states set forth unequivocal standards of competency.[288] Crafting broad standards that intimate only a heightened degree of legal representation invites uncertainty and debate and fails to ensure that appointed counsel possesses the degree of legal skill and experience that Chapter 154 requires.[289]

Finally, a state's statutory offer of counsel must be a meaningful offer.[290] Specifically, once a capital defendant accepts the state's statutory offer, counsel must be appointed immediately.[291] Often, however, counsel cannot promptly begin preparing for the post-conviction appeal.[292] In such instances, prisoners would be deprived of procedural due process because the six-month statute of limitations would continue to run despite the absence of appointed post-conviction counsel.[293] Capable and committed representation cannot be achieved when post-conviction preparation remains idle while the abbreviated statute of limitations continues to run.[294]

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skill, and experience required to render effective representation).

287. *See Smith*, 681 P.2d at 1381 (finding that a certain Arizona appointment system was deficient partly due to its failure to fund support staff and other resources, including paralegals, investigators, and law clerks); *see also ABA Report*, *supra* note 44, at 22 (noting the importance of available support services in capital cases).

288. *See Ashmus*, 935 F. Supp. at 1074 (concluding that the provision of definitive standards of competency for post-conviction counsel is a minimum requirement of opt-in states) (citing 137 CONG. REC. S3220 (daily ed. Mar. 13, 1991) (section-by-section analysis of the Comprehensive Violent Crime Control Act of 1991)).

289. *See ABA Report*, *supra* note 44, at 19 (arguing that broadly defined standards of competency will not ensure sufficient representation under Chapter 154).

290. *See* 28 U.S.C.A. § 2261(b) (West Supp. 1997) (requiring that any mechanism providing the appointment of post-conviction counsel must offer counsel to all state prisoners under capital sentence).

291. *See* Hill v. Butterworth, 941 F. Supp. 1129, 1146-47 (N.D. Fla. 1996) (holding "that any offer of counsel pursuant to Section 2261 must be a *meaningful offer*. That is, counsel must be immediately appointed after a capital defendant accepts the state's offer of post-conviction counsel").

292. *See id.* at 1146 (noting that as of August 7, 1996, at least forty indigent death-row prisoners in the State of Florida who were eligible to pursue post-conviction relief were unrepresented); Zuern v. Tate, 938 F. Supp. 468, 471 (S.D. Ohio 1996) (observing that an Ohio death-row inmate may be forced to prepare his own state post-conviction petition "and hope for appointment [of counsel] thereafter").

293. *See Hill*, 941 F. Supp. at 1147 n.35.

294. *See generally Zuern*, 938 F. Supp. at 471 (concluding that because Ohio's mechanism for appointment of post-conviction counsel might require capital prisoners to prepare their own petitions without the benefit of attorney assistance, the State did not "offer" counsel in a manner contemplated under Chapter 154); *see also Hill*, 941 F. Supp. at 1147 (determining that absent the immediate appointment of counsel upon acceptance of Florida's offer to provide post-conviction counsel, Chapter 154 would be rendered meaningless).

D. Compensation

Perhaps the most important element in providing capable and committed representation, particularly in capital post-conviction litigation, is attorney compensation.[295] The practice of law is an attorney's stock in trade[296] and, like any entrepreneur, a lawyer naturally will pursue employment that commands the greatest level of remuneration.[297] Traditionally, compensation for court appointments has been so low that few experienced attorneys have been willing to represent indigent capital defendants.[298] Furthermore, capital defense work is particularly "unattractive."[299] Capital defense attorneys endure immense pressure, incorrigible clients, public animosity, long hours, and the risk of damaging relations with paying clients.[300]

State appointment programs must provide compensation at levels sufficient to attract capable and committed lawyers.[301] Compensation should be awarded in proportion to the experience, competency, and effectiveness of individual lawyers.[302] Increases in compensation also

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295. *See* Martinez-Macias v. Collins, 979 F.2d 1067, 1067 (5th Cir. 1992). In *Martinez-Macias*, the United States Court of Appeals for the Fifth Circuit affirmed a district court judgment granting a writ of habeas corpus in which a capital petitioner claimed the denial of adequate counsel. *See id.* The court candidly commented that Texas "paid defense counsel $11.84 per hour. Unfortunately, [Texas] got only what it paid for." *Id.*; *see also* Bright, *supra* note 192, at 1853 (noting that the *Martinez-Macias* court acknowledged the correlation between attorney compensation and the level of representation provided).

296. *See* State *ex rel.* Stephan v. Smith, 747 P.2d 816, 841 (Kan. 1987) (recognizing that attorneys offer for sale the valuable commodity of professional knowledge); State *ex rel.* Partain v. Oakley, 227 S.E.2d 314, 319 (W. Va. 1976) (explaining that "an attorney's time is his stock in trade").

297. *See* Bright, *supra* note 192, at 1855 (discussing the unlikely prospect that lawyers would pursue appointments in capital cases when more lucrative opportunities are available in other practice areas).

298. *See id.* (commenting that "[l]awyers who have been appointed to defend the poor in capital trials often vow never to handle another .... Even at $200 an hour, it would be difficult to attract lawyers to handle these cases.").

299. *See id.* at 1871.

300. *See id.* at 1855 (describing the financial, emotional, and professional detriment suffered by attorneys appointed to defend capital clients).

301. *See* Booth v. Maryland, 940 F. Supp. 849, 854 n.6 (D. Md. 1996) ("[T]he payment of at least minimally reasonable compensation is necessary to obtain competent counsel, an express requirement of [Chapter 154]."), *vacated*, 112 F.3d 139 (4th Cir. 1997), *and petition for cert. filed*, (Aug. 14, 1997) (No. 97-5623); *see also ABA Report*, *supra* note 44, at 22 (recognizing that inadequate compensation does not attract competent lawyers to defend capital cases); *cf.* Bright, *supra* note 192, at 1871 (arguing that in order to provide capital defendants with capable representation, "a significant financial incentive, considerably beyond what lawyers receive for far less demanding legal work, will be required").

302. *See ABA Report*, *supra* note 44, at 22 (recommending that attorneys fees should be awarded based upon actual time spent and services performed).

should be provided contingent upon favorable performance reviews.[303] Such a system would encourage young lawyers, who otherwise would gravitate toward more profitable practice areas, to remain committed to the practice of capital post-conviction litigation.[304]

Many public defender systems have suffered from the pervasive problem of compensatory caps.[305] Appointment systems often prescribe limits on attorneys' fees and litigation expenses regardless of the complexity or time requirements individual cases may entail.[306] For lawyers who rely on paying clients for income, compensation caps often create conflicts of interest.[307] Once the permitted number of compensable hours is expended, counsel has no financial incentive to devote additional time to representing an indigent client.[308] Accordingly, compensation caps should not be incorporated into state appointment mechanisms.[309]

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303. *Cf.* NANCY ALBERT GOLDBERG & JAY LAWRENCE LICHTMAN, GUIDE TO ESTABLISHING A DEFENDER SYSTEM 20 (1978) (advising that an attorney fee mechanism "should be designed to compensate attorneys for effort, skill and time actually, properly and necessarily expended in assigned cases").

304. *See* Mackenzie v. Hillsborough County, 288 So. 2d 200, 202 (Fla. 1973) (Ervin, J., dissenting) (noting that "[i]n our pecuniary culture the calibre of personal services rendered usually has a corresponding relationship to the compensation provided"); *see also* Bright, *supra* note 192, at 1852 (observing that young criminal lawyers who have or develop effective trial techniques inevitably pursue more lucrative practice areas including personal injury, drug, pornography, and white collar crime cases).

305. *See* Klein, *supra* note 192, at 371-75 (discussing the pervasive problems caused by compensation caps in appointment systems).

306. *See id.* at 371 (noting that states vary widely in establishing maximum fees).

307. *See* State v. Smith, 681 P.2d 1374, 1382 (Ariz. 1984) (en banc) (warning that allocating scarce time and resources between paying clients and indigent clients could constitute a breach of professional responsibility and grounds for disciplinary action if counsel accepts more cases than he can handle properly); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) cmt. 6 (1997) ("The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee."); *cf.* State *ex rel.* Scott v. Roper, 688 S.W.2d 757, 767 (Mo. 1985) (en banc) (recognizing that lawyers, who increasingly focus on maximizing profits due to "skyrocketing" overhead costs, are less willing to defend indigents because "time spent representing an indigent defendant is time the attorney cannot spend on more profitable matters" (quoting State v. McKenney, 582 P.2d 573, 577 (Wash. Ct. App. 1978))). In *Roper*, the court emphasized that it is unjust to impose upon only a select group of lawyers burdens that are rightfully borne by society as a whole. *See* 688 S.W.2d at 767; *see also* Klein, *supra* note 192, at 374 (observing that compensation caps create conflicts of interest by discouraging lawyers from devoting additional time to defend indigent clients).

308. *See* Klein, *supra* note 192, at 374 (maintaining that compensatory caps can create conflicts of interest between counsel and his client); *cf. ABA Report*, *supra* note 44, at 22 (acknowledging "that adequate compensation of counsel is indispensable to competent assistance").

309. *See* Bright, *supra* note 192, at 1867-70 (arguing in favor of comparable funding for

E. Reasonable Litigation Expenses

Chapter 154 requires that opt-in states provide payment of reasonable litigation expenses in capital post-conviction proceedings.[310] Fundamental fairness dictates that post-conviction counsel possesses the necessary tools to render capable and committed advocacy,[311] and that reasonable litigation expenses be assessed in proportion to the tremendous burdens facing post-conviction counsel subject to Chapter 154.[312]

First, litigation expenses and attorney compensation must be assessed and dispersed separately.[313] Allocating compensation and litigation funds together encourages lawyers to limit expenditures in defending indigents to maximize their own profits.[314] Furthermore, judges should not be

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prosecution and public defense systems); Howard, *supra* note 275, at 891 (characterizing a low statutory fee cap "as a disincentive to those attorneys who are the most capable of handling [indigent death penalty] cases"). Recent state-court decisions reflect an emerging trend towards eliminating restrictions on the payment of attorney fees in light of the increasing complexity of criminal law and an awakening of social consciousness of the plight of underpaid court-appointed lawyers. *See, e.g.*, Arnold v. Kemp, 813 S.W.2d 770, 775 (Ark. 1991) (holding that a statutory fee cap limiting attorney fees to $1,000 and investigation expenses to $100 constituted a "taking" within the meaning of the Due Process Clause of the Arkansas Constitution); White v. Board of County Comm'rs, 537 So.2d 1376, 1378 (Fla. 1989) (holding that a court-appointed attorney in a capital case was entitled to payment in excess of the statutory maximum of $3,500, reasoning that "we are hard pressed to find any capital case in which the circumstances would not warrant an award of attorney's fees in excess of the current statutory fee cap"); Makemson v. Martin County, 491 So.2d 1109, 1114 (Fla. 1986) (holding that courts may award payments to appointed counsel in excess of a statutory fee cap in "extraordinary" cases, reasoning that "[t]he link between compensation and the quality of representation remains too clear"); Wilson v. State, 574 So.2d 1338, 1340 (Miss. 1987) (preserving the constitutionality of a statute limiting attorney fees to $1,000 by interpreting the provision allowing for "reimbursement of actual expenses" to include "all actual costs to the lawyer for . . . keeping his or her door open to handle th[e] case").

310. *See* 28 U.S.C.A. § 2261(b) (West Supp. 1997) (requiring that opt-in states establish a system for the payment of reasonable litigation expenses).

311. *See* Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (stating that fundamental fairness demands that indigent defendants are furnished the necessary resources to mount an adequate defense); *see also ABA Report*, *supra* note 44, at 22 (explaining that providing the basic tools of adequate representation is essential to the maintenance of fundamental fairness in capital cases).

312. *Cf.* Washington v. Strickland, 693 F.2d 1243, 1251 (5th Cir. 1982) (en banc) (emphasizing that whether a pre-trial investigation is "reasonable" turns on several factors including "the number of issues in the case, the relative complexity of those issues, the strength of the government's case, and the overall strategy of trial counsel"), *rev'd on other grounds*, 466 U.S. 668 (1984); *see also ABA Report*, *supra* note 44, at 22 (recognizing that without adequate support services, even qualified lawyers may be unable to provide competent representation).

313. *Cf.* Bright, *supra* note 192, at 1847-49 (citing examples where inadequate state funding forced counsel to furnish out-of-pocket investigative expenses).

314. *Cf. ABA Report*, *supra* note 44, at 21-22 (proposing that attorney compensation and litigation expenses be assessed separately).

authorized to allocate funds for litigation expenditures.[315] Historically, judicial management of indigent defense programs has frustrated efforts to provide capable and committed advocacy.[316]

Second, capable and committed representation in post-conviction litigation requires a thorough re-evaluation of the facts of the case.[317] Chapter 154 requires that states offer new counsel to capital defendants in state post-conviction proceedings and virtually eliminates consideration of successive and unexhausted claims.[318] Therefore, these harsh limitations magnify the necessity that newly appointed counsel conduct a thorough post-trial investigation.[319]

In preparing for post-conviction litigation, counsel must digest the trial record, files, interview transcripts, and any other reports.[320] Additionally, counsel must re-examine physical evidence and re-interview critical witnesses.[321] Trial transcripts and relevant records pertaining to all co-defendants also must be examined.[322] Discovery of pre-existing conditions, including mental illness, retardation, or physical abuse overlooked

315. *See* Bright, *supra* note 192, at 1870 (arguing that elected judges and politicians often are improperly influenced by political forces); Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523, 531 (1996) (explaining that appointment of qualified counsel in capital cases often runs counter to political interests of popularly elected judges and state officials).

316. *See* Bright, *supra* note 192, at 1870 (maintaining that judges often are improperly influenced by political considerations when appointing defense counsel in capital cases).

317. *See* Mello & Duffy, *supra* note 60, at 490 (arguing that reinvestigation of facts not contained in the trial record is paramount to effective post-conviction litigation).

318. *See* 28 U.S.C.A. § 2264(a) (West Supp. 1997).

319. *See* Ashmus v. Calderon, 935 F. Supp. 1048, 1071 (N.D. Cal. 1996) (asserting that investigation in collateral proceedings is essential because petitioners must present all constitutional claims to avoid procedural default), *aff'd*, 123 F.3d 1199 (9th Cir. 1997), *cert. granted in part*, 118 S. Ct. 596 (1997).

320. *See* Mello & Duffy, *supra* note 60, at 490 (noting that the trial transcript and the record from the direct appeal routinely may consist of several thousand pages of text).

321. *See id.* (reviewing the many pre-trial tasks necessary for providing effective post-conviction representation).

322. *See id.* at 491. Section 2244(b) virtually bars judicial consideration of sentence-related claims raised in successive habeas corpus petitions. *See* 28 U.S.C.A. § 2244(b)(2)(ii) (requiring, as a threshold matter, that a petitioner raising a claim that was not presented in a prior petition must demonstrate, in part, that "the facts underlying the [successive] claim, if proven . . . would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant *guilty of the underlying offense*" (emphasis added)). Therefore, it is imperative that counsel assert and preserve claims related to mitigation in a capital sentencing proceeding. *Cf. House Report*, *supra* note 15, at 11 (opining that successive petitions "should be confined . . . to the compelling case of a defendant who raises grounds that cast serious doubt on his factual guilt").

by trial counsel may require psychiatric or medical evaluation.[323] Counsel may require the aid of pathologists, hair and fiber experts, ballistics experts, and other technical assistance to obtain new evidence or to aid in the reinvestigation process.[324] Additionally, counsel must stay abreast of new developments in federal and state habeas corpus law, and devote careful attention to drafting post-conviction petitions in compliance with state and federal pleading requirements.[325]

Within a mere six-month time period, post-conviction counsel cannot properly represent a death-row petitioner without considerable assistance.[326] Therefore, adequate funding is needed to employ highly trained and effective investigators and experts to provide competent services.[327] Because every capital case is unique, it is imperative that litigation funding be readily accessible and free from compensatory caps.[328] Counsel who is forced to prepare for collateral review in only six months cannot afford to be derailed by needless administrative obstacles.[329] Each state should devise a system to provide payment of reasonable litigation expenses in capital collateral proceedings.[330] Ultimately, the adequacy of the system must turn solely on whether it accords indigents capable and committed representation.[331]

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323. *See* Mello & Duffy, *supra* note 60, at 491 (noting that every "effort[] must be made to ensure that such an examination is conducted properly").

324. *See id.*

325. *See* Clarke, *supra* note 23, at 1380-81 (warning that the improper transposition of the substantive claims from state to federal pleadings may provide a federal court with sufficient grounds to interpret the claims contained in the federal petition as "new," and thus, unexhausted).

326. *Cf.* Mello & Duffy, *supra* note 60, at 497-98 (characterizing the six-month time limit as an "insurmountable" barrier to adequate representation in capital habeas proceedings).

327. *See ABA Report*, *supra* note 44, at 21-22 (arguing that expert witness, investigators, and other support services are essential in capital cases).

328. *Cf.* Bright, *supra* note 192, at 1846 (explaining that courts occasionally allocate funds for investigative services and expert witnesses contingent upon a demonstration of need, requiring the aid of the very assistance which is sought).

329. *See* Mello & Duffy, *supra* note 60, at 497 (noting the complexity, difficulty, and many hours required to prepare for post-conviction proceedings).

330. *See* ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERV. 5-1.4. (3d ed. 1992) ("The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process.").

331. *See Powell Committee Report*, *supra* note 15, at 3242 (noting that "[t]he purpose of this [appointment] mechanism is to assure that collateral review will be fair, thorough, and the product of capable and committed advocacy").

V. CONCLUSION

Contemporary statutory and judicial procedural barriers have limited the availability of habeas corpus review for state prisoners under capital sentences. In reforming the federal habeas corpus process, Congress sought to provide capital petitioners with a fair and efficient course of state and federal post-conviction review. Congress enacted the AEDPA to achieve this goal and demanded that states faithfully adhere to the requirement that only capable and committed counsel are appointed to represent death-row inmates in state post-conviction proceedings. Absent such faithful adherence, Chapter 154 may do little more than further grease the already slippery slope to execution at the expense of capital prisoners' constitutional rights.

VI. APPENDIX

A BILL

To provide for the creation and maintenance of a governing body to regulate the appointment of capable and committed counsel to represent indigent death-sentenced prisoners in pursuing state post-conviction relief and certiorari review in the United States Supreme Court. In accordance with the provisions of this Act, this governing body shall be granted authority of law to ensure that all capital state post-conviction petitioners enjoy the unadulterated right to capable and committed counsel in every phase of post-conviction review. This Act is intended to bring this State/Commonwealth into conformity with the requirements of Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996.

Be it enacted by the Senate and House of Representatives of this State/Commonwealth assembled.

That § 100 *et seq.* of Title I is created by inserting the following—

SECTION 100. TITLE OF THE ACT, PURPOSE OF THE ACT, CREATION OF THE POST-CONVICTION REPRESENTATION COMMISSION

(a) This Act hereinafter shall be known as the "Post-Conviction Representation Act of 1998."

(b) This Act is designed to bring this State into compliance with the qualifying provisions contained in Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996, so as to make available to this State the expedited process of federal habeas corpus review in capital cases.

(c) There is hereby created a commission to be known as the "Post-Conviction Representation Commission" (PCRC) which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

SECTION 101. COMPOSITION OF THE POST-CONVICTION REPRESENTATION COMMISSION

(a) The PCRC shall be comprised of eight commissioners and one chairman, each vested with equal voting power, to be provided reasonable compensation by the State, and to be appointed in the following manner—

(1) the chairman shall be appointed by the Governor;

(2) two commissioners shall be appointed by the director of the Office of the Public Defender;

(3) two commissioners shall be appointed by the Attorney General;

(4) two commissioners shall be appointed by the Chief Justice of the State Supreme Court;

(5) two commissioners shall be appointed by the members of the State Bar;

(b) Each commissioner and chairman shall serve a two-year term, but may not serve more than a total of three terms;

(c) Each entity authorized to appoint PCRC commissioners and chairmen shall make one such appointment annually, except for the Governor who shall appoint a new chairman every two years;

(d) No chairman or commissioner may be removed except upon a showing of cause and by a unanimous vote of the remaining commissioners;

(e) The legislature shall review annually, and provide the PCRC sufficient funding, as the legislature may deem necessary to implement and enforce the provisions of this Act;

(f) Additional funding shall be made available to the PCRC, without unreasonable delay, in interim periods upon a rational showing of need; and

(g) A majority vote of the commissioners shall constitute a binding resolution of any measure brought forth for the PCRC's consideration.

SECTION 102. PRE-EMPTION CLAUSE

Irrespective of any other provision of this, or any other Act, nothing contained herein shall be construed as to require the PCRC to undertake, initiate, adopt, or commence, or fail to commence any proceeding or procedure which the PCRC reasonably believes to be inconsistent with the primary purpose of providing capable and committed representation to all indigent prisoners sentenced to death in this State/Commonwealth in pursuing state post-conviction review.

SECTION 103. DUTIES OF THE POST-CONVICTION REPRESENTATION COMMISSION

(a) The PCRC is hereby charged to create and maintain a mechanism for the appointment of qualified counsel to represent indigent capital defendants seeking state post-conviction review and certiorari review in the United States Supreme Court;

(b) The PCRC-created mechanism shall provide for the systematic and orderly assignment of only capable and committed counsel, as shall be defined by PCRC subject to the provisions of this Act, to represent indigent capital defendants, subject to the following requirements—

(1) the PCRC is authorized to select only capable and committed counsel;

(2) the PCRC shall regulate, under authority of law as herein provided, all aspects of the appointment process;

(3) the PCRC shall promulgate specific and definitive standards of competency for appointed counsel that are calculated to ensure the provision of only capable and committed representation; notwithstanding any other provision of this Act, nothing contained herein shall be construed to permit the adoption of minimum standards already applicable to representation of defendants in criminal cases in general;

(4) the PCRC shall compensate appointed counsel at rates providing no less than the average salary paid attorneys state-wide in any given fiscal year, as reported annually by the State Bar; and

(i) provide annual increases in compensation at rates, to be established by the PCRC, that are contingent upon the rendering of effective representation and proportionate to an attorney's individual level of skill and expertise, as shall be determined by the PCRC;

(ii) provide additional compensation, as the PCRC may subsequently deem necessary, to ensure the provision of only capable and committed post-conviction representation in capital cases; and

(iii) fully and timely reimburse counsel for any and all incidental litigation expenses;

(5) the PCRC shall provide attorney compensation independent of any other expenses for which counsel is otherwise entitled;

(6) the PCRC shall render compensation periodically during the course of counsel's representation;

(c) The PCRC shall provide for the payment of reasonable litigation expenses, including, but not limited to—

(1) investigative services;

(2) support personnel and other resources;

(3) medical, psychiatric, scientific, ballistic, or any other evaluative services;

(4) expert witnesses; and

(5) any other reasonable litigation expenses the PCRC deems necessary to ensure the provision of only capable and committed representation;

(d) The PCRC shall establish annual training and education programs, and litigation/legal support services available to counsel twenty-four hours a day, 365 days of the year, that focus on the legal and technical issues pertinent to providing capable and committed post-conviction representation in capital cases;

(e) The PCRC shall establish and enforce specific and detailed minimum standards governing attorney workloads, taking into consideration, at minimum, the following—

(1) the time an attorney is expected to spend effectively representing assigned cases;

(2) the level of competence, skill, and experience of individual lawyers in relation to the number of cases assigned;

(3) the complexity of each case; and

(4) the availability of support staff and other resources;

(f) The PCRC shall prohibit, imposing sanctions when necessary, capital post-conviction counsel from accepting workloads which, by reason of their excessiveness, potentially may interfere with the rendering of capable and committed representation or lead to a breach of professional responsibility; and

(g) The PCRC shall provide for any additional resources or personnel not otherwise mentioned herein, which the PCRC may determine to be relevant and helpful to the provision of capable and committed advocacy in post-conviction representation.

SECTION 104. AUTHORITY OF THE POST-CONVICTION REPRESENTATION COMMISSION, CONSEQUENCES OF SUBSEQUENT JUDICIAL ACTION, REQUIREMENTS GOVERNING THE APPOINTMENT OF COUNSEL

(a) Pursuant to this Act, any standards, rules, or regulations promulgated by the PCRC shall be binding on all courts of this state;

(b) Challenges to standards, rules, or regulations promulgated by the PCRC may be resolved by litigation in the courts of this state;

(c) In the event that any provision of this Act or any regulation promulgated by the PCRC related to standards of attorney competency, compensation of counsel, or payment of reasonable litigation expenses is found to be unconstitutional or otherwise invalidated, or, if in judgment of the PCRC, the established appointment mechanism is found to be, at any time hereafter, incapable, for whatever reason(s), of providing the requisite capable and committed representation as mandated under the provisions of this Act—

(1) all capital post-conviction cases either active or pending shall be held in abeyance until acceptable standards are restored by the PCRC; and

(2) any capital petitioner who unsuccessfully challenged a provision of the this Act, or any standard, rule, or regulation provided under §§ 103-04 of this Act which subsequently is found to be unconstitutional or invalidated may file a successive petition in any state court seeking further relief in light of such subsequent judicial action;

(d) The PCRC, pursuant to §§ 103 *et. seq.* of this Act, is delegated the exclusive authority to establish and to maintain a mechanism for the appointment of capable and committed post-conviction counsel, subject to the following provisions—

(1) in all post-conviction cases in which a defendant, having been sentenced to death by judicial decree, is eligible to receive appointed counsel, such defendant shall be appointed no fewer than two post-conviction attorneys, including at least one lead counsel and one assistant counsel;

(2) assistant attorneys appointed to represent indigent defendants in capital post-conviction proceedings must, at minimum—

(i) be members in good standing to practice in this State/Commonwealth or admitted *pro hac vice*; and

(ii) be experienced and active in the trial practice of criminal law, as shall be defined by the PCRC, with at least five years experience in the field of criminal defense; and

(iii) have prior experience as counsel of record in no fewer than five jury or bench trials of serious and complex cases, as shall be defined by the PCRC, which were tried to completion, as well as prior post-conviction experience as a counsel or assistant counsel of record in at least three cases in either state or federal courts. Furthermore, of the five cases in which an attorney was counsel of record as previously provided in this subsection, no fewer than three must have involved a charge of murder or aggravated murder; and

(iv) be familiar with the practice and procedure of the appropriate courts of this jurisdiction, as shall be defined by the PCRC; and

(v) have attended and successfully completed, within one year prior to appointment in any capital post-conviction case, a training or continuing education program to be established by the PCRC pursuant to § 103(d) of this Act; and

(vi) satisfy any additional requirements for the appointment of co-counsel to represent persons sentenced to death in federal habeas corpus proceedings under the applicable provisions of the Anti-Drug

Abuse Act of 1988;

(3) any lawyer appointed under this Act to serve as lead counsel must satisfy the following additional criteria, requiring that lead counsel—

(i) be experienced and active, as shall be defined by the PCRC, in the adjudication of post-conviction proceedings in capital cases with no fewer than five years experience in the practice of capital post-conviction litigation; and

(ii) shall have been an attorney of record in no fewer than five post-conviction cases in which the charge was murder or aggravated murder, or any other offense for which a death sentence was imposed; and

(iii) have satisfied any additional requirements of federal law for the appointment of lead post-conviction counsel to represent persons sentenced to death in federal habeas corpus proceedings pursuant to the applicable provisions of the Anti-Drug Abuse Act of 1988;

(4) the PCRC shall offer every capital defendant, once his conviction and sentence of death is affirmed on direct appeal, appointed counsel upon entry of a court order finding that the defendant is indigent; and

(5) counsel must be appointed immediately and must begin preparing for post-conviction proceedings no later than ten days following entry of the appropriate court order.

SECTION 105. REMOVAL AND SUPERVISION OF APPOINTED COUNSEL

(a) When the PCRC reasonably concludes, based on articulable factual evidence, that an attorney appointed pursuant to the Act, has failed to provide, or threatens to fail to provide, the requisite degree of capable and committed representation, the PCRC shall immediately—

(1) petition the court in writing for the removal and substitution of such counsel. No court shall deny such a petition unless the court makes a good-faith determination, based upon clear and convincing evidence, that a petition requesting the removal of counsel was filed only as a deliberate attempt to delay the resolution of the proceeding; the court shall state on the record specific reasons in support of such a ruling. Furthermore, the PCRC need not wait until actual harm is inflicted due to counsel's improvidence before petitioning the court for his removal; and

(2) refrain from assigning counsel further appointments once he has been removed;

(b) Notwithstanding any other provision of this Act, the PCRC

shall—

(1) conduct an annual evaluation with respect to—

(i) the performance of individual attorneys and support staff;

(ii) the adequacy of funds made available under this Act to provide for the appointment of capable and committed counsel;

(iii) the status of each case resolved or pending within the twelve preceding months; and

(iv) any other relevant issues which may impact or influence the provision of capable and committed supervision;

(2) require the periodic submission of progress reports from appointed attorneys actively involved in the litigation of capital post-conviction cases;

(3) consider and promptly respond to any and all claims alleging systemic defects or inadequate representation within fourteen days following the submission of such claims, and initiate and implement, in a timely manner, any and all corrective measures necessary to ensure the continued vitality of capable and committed representation;

(4) submit an annual report to the legislature no later than thirty days prior to the first day of each fiscal year apprising the legislature of the status of this Act's implementation and suggesting any additional legislative action.